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87-962

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

SOUTHERN UNION COMPANY,
Petitioner,

v.

CONSOLIDATED OIL & GAS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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QUESTIONS PRESENTED

(1) Whether an award of damages for negligent misrepresentation in connection with the sale of interstate gas represents an unlawful increase in the price of gas under *Arkansas Louisiana Gas Co.* v. *Hall*, where those damages are measured by the precise difference between federal ceiling prices for natural gas and higher intrastate prices.

(2) Whether the filed rate doctrine applies to statutorily-set price ceilings for natural gas sales.

(3) Whether a state standard of negligence which assumes that a federally regulated producer may be justifiably ignorant of the jurisdictional status of its gas undermines and conflicts with paramount federal regulation of interstate natural gas sales.

(4) Whether the tort of negligent misrepresentation falls within the category of "affirmative misconduct" identified by this Court as a possible exception to the preemption holding in *Arkansas Louisiana Gas Co.* v. *Hall.*

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioner Southern Union Company and respondent Consolidated Oil & Gas, Inc.[1]

STATEMENT REQUIRED BY RULE 28.1

The following listed entities are subsidiaries of Southern Union's wholly-owned subsidiaries:

(1) First Bankers Trust and Savings Association of Midland, Texas (a Texas chartered savings and loan association) is a wholly-owned subsidiary of Southern Union Financial Corporation.

(2) Unifirst of Texas, Inc. (a Texas corporation) is a wholly-owned subsidiary of First Bankers Trust and Savings Association of Midland, Texas.

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[1] A former Southern Union subsidiary, Southern Union Gathering Company, and a former Southern Union division, Gas Company of New Mexico, were parties to the underlying state court litigation. However, in 1985, Southern Union sold its New Mexico utility properties operated by its Gas Company of New Mexico division to Public Service Company of New Mexico ("PNM"). As part of the same transaction, Southern Union also sold all of the stock of Gathering Company to a wholly-owned subsidiary of PNM. Under the terms of the sale, Southern Union assumed liability for and agreed to indemnify PNM for the payment of damages awarded below. Gathering Company and Gas Company of New Mexico are no longer real parties in interest to this litigation.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

Southern Union Company respectfully petitions that a writ of certiorari be issued to review an opinion and order of the Supreme Court of the State of New Mexico.

JURISDICTION AND OPINIONS BELOW

The Opinion of the Supreme Court of the State of New Mexico, entered July 9, 1987, is reprinted as Appendix A at 1a-14a. The Order of the Supreme Court of the State of New Mexico, denying Southern Union Company's petition for rehearing, entered August 14, 1987, is reprinted as Appendix B at 15a. By order of Justice Byron R. White entered October 16, 1987, reprinted as Appendix H at 69a, the time for filing this petition was extended to December 12, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) (1982).

STATUTES INVOLVED

Relevant sections of the federal statutes involved herein, the Natural Gas Act of 1938, 15 U.S.C. §§ 717-17z (1982) ("NGA"), and the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301-432 (1982) ("NGPA"), are reprinted as Appendices I and J, respectively, at 70a-80a and 81a-88a.

STATEMENT OF THE CASE

In 1979, respondent Consolidated Oil & Gas, Inc. ("Consolidated"), a producer of natural gas in New Mexico and sixteen other states, sued petitioner Southern Union Company ("Southern Union"), an integrated natural gas company, in New Mexico state court for breach of contract. The alleged breach was Southern Union's refusal to pay intrastate prices for gas sold under four interstate contracts as purportedly required by a 1976 agreement between the parties settling earlier contract litigation.

The case arose after twenty years of federally regulated and certificated sales of natural gas between the two companies.[1] In settlement of litigation over the operation of most favored nations clauses in intrastate contracts, involving in part both petitioner and respondent, Southern Union agreed to amend the pricing provisions of six contracts for sales of jurisdictionally intrastate gas. Consolidated requested, and Southern Union agreed, to add to the settlement agreement the four contracts for the sale of jurisdictionally interstate gas and to

[1] The facts and circumstances that unequivocally establish that the gas at issue in the litigation below was dedicated to interstate commerce and subject to federal price and abandonment controls are set forth in *Consolidated Oil & Gas, Inc.* v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986), and the FERC orders it reviews (*Southern Union Gathering Co.*, 28 FERC ¶ 61,225 (Aug. 20, 1984), *Southern Union Gathering Co.*, 30 FERC ¶ 61,350 (Mar. 22, 1985), reprinted as Appendices C and D, respectively, at 16a-27a and 28a-41a).

amend their pricing provisions. The attorneys drafting and reviewing the agreement did not correct a discrepancy in the introductory statement that described all of the contracts covered by the settlement agreement as intrastate in nature. When Southern Union refused to pay the intrastate price on the four jurisdictionally interstate contracts that were subject to a lower federal ceiling rate, Consolidated sued for breach of the agreement, requesting the difference between the two rates in damages.

Beginning with its answer to the complaint, Southern Union maintained the defense that the damages sought by Consolidated are preempted by pervasive federal regulation of the rates for interstate natural gas sales, and that Federal Energy Regulatory Commission ("FERC") approval was a prerequisite to collection of the prices Consolidated seeks. In response to the complaint, therefore, Southern Union successfully urged the New Mexico trial court to seek the opinion of the FERC on the jurisdictional and preemption issues. In 1984, FERC ruled that the gas in question was jurisdictionally interstate (*see* note 1, *supra*), but refused to rule on Southern Union's preemption claim until after the New Mexico trial concluded. Citing *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981) ("*Arkla*"), the FERC stated, however, that "Consolidated would have no right under either the filed rate doctrine or its certificate authorization to collect a rate in excess of its contract rate or the applicable ceiling price, whichever is lower, in the absence of specific authority from this Commission." App. 25a.

After *Arkla*, Consolidated amended its New Mexico complaint to add a tort cause of action alleging that Southern Union negligently misrepresented that the gas contracts covered by the settlement agreement were not subject to federal regulation. Consolidated further claimed that it justifiably relied on the statement in entering into the settlement agreement and was damaged

in an amount equal to the difference between the interstate ceiling prices it was receiving for its gas and the intrastate prices it could have received if the four contracts were not subject to federal jurisdiction.[2]

In 1985, a New Mexico trial court found Southern Union liable under the negligent misrepresentation theory and awarded the damages originally sought by Consolidated under the contract claim. Judgment was for $11,023,967 plus post-judgment interest. *Consolidated Oil & Gas, Inc.* v. *Southern Union Co.*, Final Judgment, No. SF 79-2161(c) (July 12, 1985).[3] Southern Union appealed the trial court judgment directly to the New Mexico Supreme Court, which the applicable New Mexico rules require for contract cases. N.M. Stat. Ann. §§ 34-5-8, 34-5-14 (1984 Cum. Supp.), *In re Original Appellate Jurisdiction in the New Mexico Supreme Court & New Mexico Court of Appeals*, Misc. 8000 (Order of the New Mexico Supreme Court, April 20, 1983).

The New Mexico Supreme Court upheld the trial court judgment. With respect to the state negligence claim, the New Mexico court first acknowledged that, given the undeniable dedication of the disputed gas to interstate commerce and federal price regulation, "[t]here is thus no cause of action sounding in contract available to Consolidated to recover the intrastate prices promised in the Settlement Agreement." App. 8a-9a. But the New Mexico court concluded that under the New Mexico standard of negligence, Southern Union had a "fiduciary obligation" to provide Consolidated with accurate information about

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[2] According to a damage study prepared by Consolidated, the price differential, measured from 1976 through 1985 was $8,427,978, and that was the principal amount Consolidated sought and received as damages. Plaintiff's Exhibit 32.

[3] While Consolidated did not expressly amend the Complaint to drop the breach of contract claim, it did not brief or argue breach of contract issues at trial. The trial court also found an insufficient basis to award damages for fraud.

the jurisdictional status of its gas, and that Consolidated "reasonably" relied on Southern Union's inaccurate description of the gas in the settlement agreement. *Id.* at 11a.

The New Mexico court rejected Southern Union's federal preemption defense. It declared itself in agreement with an Order of the Federal Energy Regulatory Commission ("Commission") issued in an administrative proceeding,[4] that the preemption holding in *Arkla* was not applicable to the New Mexico trial court damage award for two reasons: *Arkla* was decided on the basis of the filed rate doctrine "which is inapplicable" to this case, and "tort damages do not conflict with federally regulated pricing." *Id.* at 12a. On August 14, 1987, the court denied Southern Union's Motion for Rehearing and granted a stay of execution of the judgment pending the outcome of this petition. App. 15a.

REASONS FOR GRANTING THE WRIT

Six years ago, in *Arkansas Louisiana Gas Co.* v. *Hall*, the Court found that the filed rate doctrine precluded a state court award of damages for breach of a sales

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[4] Following the trial court's decision in 1985, Southern Union petitioned the Commission for a declaratory order that because the damage award is, in effect, a rate increase, Consolidated cannot lawfully collect the damages absent Commission review and approval. On June 19, 1986, the Commission issued an order declaring that state court tort damage awards cannot violate the maximum lawful price provisions of the NGPA, nor interfere with the federal regulatory scheme. *Southern Union Co.*, 35 FERC ¶ 61,359 (1986), reprinted as Appendix E at 42a-55a. Southern Union's request for rehearing was denied, *Southern Union Co.*, 39 FERC ¶ 61,212 (May 22, 1987), reprinted as Appendix F at 56a-58a. After Southern Union sought review of that order from the U.S. Court of Appeals for the D.C. Circuit, the Commission reconsidered its ruling on its own motion, abandoned the principal rationale of its earlier ruling, but maintained its conclusion. *Southern Union Co.*, Nov. 20, 1987, reprinted as Appendix G at 59a-68a. Review continues in the D.C. Circuit where Southern Union has filed a motion for expedited consideration.

agreement that was tantamount to a rate increase for interstate natural gas sales. In that case, the defendant had neglected to inform the plaintiff of facts that made the rate increase appropriate under the contract, despite a duty to do so, and thus the plaintiff did not file an application with the FERC for a rate increase to which it was entitled. The Louisiana courts found that the defendant's conduct amounted to breach of contract, and awarded damages based on the difference between the federally-approved filed rate and the rate increase that the plaintiff would otherwise have filed. The Court struck down the award on the grounds that it interfered with exclusive federal regulatory authority over prices for interstate natural gas.

Southern Union respectfully submits that the Supreme Court of New Mexico has decided the federal question it faced in this case in direct conflict with the rule of *Arkla*. Both the logic and the holding of *Arkla* dictate that where state damage awards interfere with a federal scheme of rate regulation, the state action must yield to the federal scheme. The two distinctions advanced by the New Mexico court—that *Arkla* was a filed rate case, and was applicable only to contract cases—constitute a superficial and mistaken construction of *Arkla*. *Arkla* did not turn merely on whether the federal regulation is implemented by filed rates or some other mechanism established by Congress—in this case, the Natural Gas Policy Act. Nor did it turn on whether a state court labels a claim as tort or contract. Indeed, these distinctions conflict with preemption decisions of this Court that require a substantive inquiry into whether the state action interferes with the uniform scheme of gas regulation, and that preclude a state court's reliance on labels. *Arkla* is grounded, in fact, in basic preemption doctrine: that there can be no state interference with the mechanisms Congress has chosen to determine natural gas rates.

The New Mexico holding has ramifications well beyond the circumstances of this case. The state negligence standard, as applied to a regulated gas producer, is inconsistent with the duties imposed on producers by Congress under the NGA and the NGPA. Producers are required to have actual or constructive knowledge of the statutes and regulations that govern their interstate sales. The New Mexico holding is premised, however, on a producer's legal or "justifiable" reliance on a single misstatement concerning the status of its gas, one inconsistent with well over ten years of that producer's certificated gas sales in interstate commerce. App. 10a-11a.

Uniform regulation of natural gas companies will be impossible if states are free to evaluate their conduct in light of tort standards which are inconsistent with federal regulation of that conduct. Those companies would be subjected to different and possibly conflicting standards among the states, which would further undermine Congress' goal of uniformity. The Supremacy Clause mandates the preemption of inconsistent state standards of conduct such as the one imposed in New Mexico.

The *Arkla* Court recognized that a single exception to its holding might be appropriate, where "affirmative misconduct" formed the basis for the state court action, but the Court explicitly "save[d] for another day" resolution of that question. 453 U.S. at 583 & n.13. The possible exception for affirmative misconduct, however, contemplated more than simply a tort involving alleged negligence. Moreover, even if the New Mexico court correctly characterized this case as the one that *Arkla* "save[d] for another day," it misapplied the Court's precedent in the preemption area in analyzing the question *Arkla* reserved.

Certiorari or summary reversal is appropriate here because the New Mexico court failed to follow *Arkla* and did not undertake any analysis of the serious preemption

issues before it. Alternatively, the Court should grant certiorari here to resolve the question put aside six years ago.

A. The New Mexico Decision Misapplies *Arkansas Louisiana Gas Co.* v. *Hall* and Conflicts With Other Applicable Preemption Precedent

The paramount federal interest in the transportation and sales of natural gas has been affirmed by a long line of decisions of the Court, including *Arkla*. Beginning in 1954, the Court has upheld federal authority over independent producers of natural gas sold in interstate commerce, *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954), the primacy of federal authority over private contracts, *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965), and even the dominance of the congressional decision to deregulate interstate gas prices over indirectly interfering state regulation. *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409 (1986). *Arkla* reaffirmed and clarified that federal occupation of the field of natural gas sales and rates precludes inconsistent state court contract claims. These and other cases have recognized the steadfast purpose of Congress to establish uniformity in the regulation of interstate natural gas sales.

While the goal of uniform regulation has remained constant, the method of regulation has changed over the years. Under the NGA, the Commission set price ceilings for sales from gas producers to pipelines and regulated the pipeline's rates to their downstream customers to insure that both sales prices and transportation rates were "just and reasonable." Through strict enforcement of gas sale certification and abandonment requirements, the Commission also acted to protect the supply of natural gas to interstate customers. In the late 1970's, Congress concluded that a new approach to natural gas regulation was needed, and adopted in the NGPA a "commodity value pricing approach." *Transcontinental*, 474 U.S. at

421. The federal role changed from sales certification and rate-making to overseeing a national, market-based regulatory scheme. Under the NGPA, producers may charge up to statutory ceiling prices and the prices are automatically passed through to consumers, unless the Commission decides otherwise. Although the method of regulation has changed, "The NGPA therefore does not constitute a federal retreat from a comprehensive gas policy" and interstate gas prices remain a "subject of deep federal concern." *Id.* at 421-22.

The New Mexico court acknowledged, as it must, the dominant federal interest in natural gas rates and correctly observed that had the award of damages to Consolidated been based on a breach of contract theory, it would have been preempted by direct application of *Arkla*. App. 12a. It nonetheless refused to apply *Arkla* because it construed that case as limited to breach of contract actions and to cases involving filed rates. Moreover, the court perceived no conflict between the trial court judgment and federal regulation.

1. Contrary to the New Mexico view, the Court's analysis in *Arkla* controls the analysis here. *Arkla* clearly focuses upon the relationship between state court damages and the congressional purpose behind comprehensive natural gas price regulation:

> It would undermine the congressional scheme of uniform rate regulation to allow a state court to award as damages a rate never filed with the Commission and thus never found to be reasonable within the meaning of the Act.

453 U.S. at 579. The *Arkla* framework thus requires consideration of whether a state court damage award reflects an attempt by parties "to vary by private agreement" federally regulated rates and thus to "undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate." *Id.* at 582.

The New Mexico court failed, in its one-page discussion of the preemption issue, to engage in the analysis that *Arkla* requires. See App. 12a. The court ignored clear signs that the suit was initiated to avoid federal price ceilings. In its 1979 complaint—filed two years before *Arkla*—Consolidated alleged that Southern Union had breached the settlement agreement by refusing to make payments in excess of the price ceilings imposed under the NGA and NGPA. Southern Union raised the jurisdictional defense in its answer, and filed a motion for a stay pending a decision by FERC, the proper forum for addressing the issues raised by Consolidated. Nearly five years later, after the Court issued its *Arkla* decision, Consolidated added its negligent misrepresentation claim and, on the eve of trial, all but abandoned its contract claim. *See* note 3, *supra.*

Consolidated proceeded to trial on its negligent misrepresentation theory. The trial court found Southern Union liable and awarded damages based on the difference between the interstate ceilings and the higher intrastate price referenced in the settlement agreement. This measure of damages, the difference between the contract rate and the federal ceiling rate, was the precise measure found unlawful in *Arkla.*[5]

Consolidated was an experienced producer of natural gas, and had engaged in interstate sales for decades.

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[5] The trial court adopted Consolidated's proposed measure of damages. Consolidated subtracted the interstate price applicable to gas sold from each well from the higher intrastate price provided for in the settlement agreement in order to arrive at a "price differential" for each well, *i.e.*, an amount in excess of the area ceiling rates, ranging from $.33 to $1.86 per Mcf. Consolidated multiplied the total volume produced from each well by the applicable price differential to arrive at an underpayment amount, and then added the underpayments for each well to arrive at a "total underpayment." *See* note 2, *supra.*

Consolidated signed applications for certificates of public convenience and necessity to the Commission—as required by federal law—to dedicate the gas in question to interstate jurisdiction. As an experienced producer, Consolidated knew, or is charged with knowing, that interstate gas can only be sold at the interstate price.

If these circumstances were not sufficient to alert the New Mexico court that it need undertake something more than a cursory approach to the preemption issue, Consolidated's own testimony should have provoked the court's scrutiny. Upon cross-examination, Consolidated's president conceded:

> Q. And your understanding of what that bargain was, Mr. Trueblood, . . . that they should pay you the intrastate price for interstate gas; that's [the] bargain?
>
> A. That's . . . in accordance with the bargain.
>
> Q. And that's the basic objective of this litigation; is that correct?
>
> A. Yes. That's the basic objective.

(R. 250-51).

Arkla, and additional preemption holdings of the Court, compel an analysis of these and other factors to determine whether the award of damages interferes with the comprehensive federal system of natural gas price regulation such that it must be preempted. The New Mexico court engaged in no analysis whatsoever, much less the one mandated by the Court. It did not consider the relationship between the tort claim, the damage award, and the applicable federal regulation. It ignored the significance of Consolidated's switch from contract to tort theory and the testimony of its president regarding the company's objectives.

With respect to the measure of damages, the New Mexico court merely concluded that "the trial court awarded damages, not as contract prices, but as consequences for tortious conduct." App. 12a. It thus shrugged off the fact that the measure of damages—the difference between the price Consolidated expected to receive under the settlement agreement and the federal ceiling prices paid by Southern Union—was a classic contract damage calculation, substantively indistinguishable from the invalid measure in *Arkla*. The New Mexico court characterized the damage award as recompense for settling the 1976 contract litigation, but in fact the award is not based on any evidence of harm suffered. It simply awards Consolidated the "benefit" of an unlawful "bargain." Under both the NGA and NGPA, had Southern Union paid, and Consolidated accepted, the prices referenced in the settlement agreement, they would have been in violation of those Acts and subject to their penalties. *See* App. 70a, 72a-73a, 80a, 83a-88a.

Finally, the New Mexico court relied on the *Gulftide* case, which involved punitive damages, because FERC had considered it controlling; FERC, however, discarded it as applicable precedent when it reconsidered its decision after the New Mexico court had ruled. *See* note 4, *supra*. Although FERC reached the same result as the New Mexico court, albeit through a different analysis, it relied on the premise that the New Mexico judiciary had adequately explored the facts. The problem is that neither forum has ever considered all of the facts in the context of the appropriate law, as this Court's decisions dictate. FERC and the New Mexico court have relied on one another's conclusions, and neither has undertaken an appropriate preemption analysis, which *Arkla* and other cases require and to which Southern Union is entitled. The Court should grant certiorari here to assure that the necessary analysis is performed.

2. The two grounds asserted by the New Mexico court for distinguishing *Arkla* find no support in the language of *Arkla* itself and conflict with other holdings of this Court. Indeed, the New Mexico court's reliance on one of those grounds—the filed rate doctrine—also raises a significant question as to whether the NGPA mechanism for regulating natural gas rates, which replaced FERC-approved filed rates and price ceilings with statutory price ceilings, extinguishes the precedential value of this Court's preemption decisions announced under the NGA.

The New Mexico court categorically distinguishes *Arkla* "because it was decided on the basis of the filed rate doctrine, which is inapplicable to the present proceeding." App. 12a. The court suggests that precedent regarding interference with the federal scheme of natural gas regulation in filed rate cases is inapplicable to this case and to any current or future cases involving allegations of interference with the statutory ceiling prices of the NGPA, notwithstanding the fact that the resulting interference with federal regulation may be equal or greater. The New Mexico court's overly restrictive reading of the filed rate doctrine would render those filed rate cases anachronisms, would frustrate congressional policy in the setting of natural gas prices, and would provide an impetus to a new wave of litigation testing the preemptive scope of the NGPA.

The filed rate doctrine initially was applied as a prohibition against courts adjudicating the reasonableness of rates in regulated industries and ordering deviations from filed rates; as the means used by Congress and the Commission to regulate rates has changed, however, the filed rate doctrine has grown to encompass other practices undermining agency rate-making authority. These practices include state agencies' ratable-take orders, *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409 (1986) and allocations of low-cost power between utilities. *Nantahala Power & Light Co.* v. *Thorn-*

burg, 106 S. Ct. 2349 (1986). These cases, decided after the enactment of the NGPA, indicate that the modern filed rate doctrine requires courts to analyze the purposes served by the federal regulatory scheme and determine whether the challenged state action interferes with those purposes. In refusing to perform that analysis in this case, the New Mexico court plainly and incorrectly implied that the preemption decisions under the NGA—the filed rate cases—do not apply to cases arising under the NGPA.

Fundamentally, the filed rate doctrine protects the operation of federally-established price regulating mechanisms, whatever form they take.[6] The doctrine traditionally has served to ensure that the statutory delegation of price setting authority to a regulatory agency is not undermined. There is no sense in the proposition asserted by the New Mexico court that the doctrine does not apply in principle to the NGPA price ceilings established by Congress itself.

The New Mexico court's dismissal of *Arkla* on filed rate grounds demonstrates its improper focus on labels rather than substance. Indeed, the New Mexico court disregarded this Court's recent express determination that the principle embodied in the filed rate doctrine has significance well beyond "filed" rates. In *Nantahala Power & Light Co.*, 106 S. Ct. at 2357, the Court held that "the filed rate doctrine is not limited to 'rates' *per se*," but rather applies in any situation where state action interferes with federal rate regulation:

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[6] The doctrine dates back as far as 1915, when the Court explicitly stated that even intentional misrepresentation would not justify the enforcement of contract rates deviating from federally approved rates. According to *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 98 (1915), quoting *Kansas City S. Ry.* v. *Carl*, 227 U.S. 639, 653 (1913), "'[n]either the intentional nor accidental misstatement of the applicable published rate will bind'" the parties.

> The similarity between this case and the more typical application of the filed-rate doctrine is apparent from the impermissible interference that enforcement of NCUC's order would create with the scheme of federal regulation.

Id. at 2359. As the Court noted in *Transcontinental Gas Pipe Line Corp.*, the passage of the Natural Gas Policy Act in 1978 changed the mechanism for rate regulation but left untouched the principle of exclusive federal jurisdiction over wholesale gas rates.[7] The importance of confirming the applicability of the filed rate principle to preemption analysis under the NGPA merits the Court's review of this case.

3. The second basis articulated in the New Mexico decision for not applying *Arkla* also conflicts with the policies enunciated by this Court. According to the New Mexico court, because this case involves damages "for tortious conduct," the decision here is not contrary to a congressionally established scheme, as was the damage award for breach of contract in *Arkla*. *Arkla* cannot reasonably be read to hang on such a flimsy tort/contract hook. Even narrowly construed, *Arkla* stands for the proposition that a state court damage award—in contract or tort—which conflicts with federal requirements for the regulation of natural gas cannot stand. As the *Arkla* Court observed, "when Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" *Arkla* at 580, quoting *Missouri Pacific R.R. v. Stroud*, 267 U.S. 404, 408

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[7] Under regulations implementing the NGA in 1971, the price of Consolidated's sales, as a regulated seller of natural gas, was limited not by filed rates, but by a small-producer certificate. A "small producer" certificate exempted a "small producer" (as defined by the Commission's regulations) from having to file a rate schedule as long as the increase in rate did not exceed the ceiling rate set by the Commission. *See* 18 C.F.R. § 157.40 (1987). After 1978, under the NGPA, Consolidated could charge no more than the statutory—as opposed to the certificate's—ceiling rates for its gas.

(1925). Thus, when a state decision sounding in tort imposes a standard of conduct "at odds with the uniformity contemplated by Congress," it is preempted. *Arkla* at 580, citing *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

This Court has long emphasized, in preemption decisions, the *nature* of the state court action and the interests, rights, and obligations at stake, rather than the legal label:

> [O]ur cases "demonstrate that the decision to preempt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies."

Farmer v. *United Brotherhood of Carpenters*, 430 U.S. 290, 300-301 (1977), citing *Vaca* v. *Sipes*, 386 U.S. 171, 180 (1967). *See also Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971) ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern."). As the Court observed in *International Brotherhood of Electrical Workers, AFL-CIO* v. *Hechler*, 107 S. Ct. 2161 (1987), a litigant cannot escape the Supremacy Clause by a clever casting of its claim. *See also Olguin* v. *Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984) (invoking the "artful pleading doctrine" in holding a state law claim preempted); *Young* v. *Anthony's Fish Grottos, Inc.*, 830 F.2d 993, 999 (9th Cir. 1987) ("The key to determining the scope of preemption is not how the complaint is cast, but whether the claims can be resolved only by referring to the terms of the collective bargaining agreement.").

Indeed, the key issue in *Arkla* was whether the state court action undermined uniformity established by a federal regulatory scheme, not the label attached to the

claim brought in the state court. In *Kalo Brick & Tile, Co.*, decided the same term and cited in *Arkla*, the Court held that a tort action for damages resulting from the cessation of service by a rail carrier was preempted. The Court determined that allowing a state to impose its own legal requirements on carriers regulated by the federal government "could hardly be more at odds with the uniformity contemplated by Congress in enacting the Interstate Commerce Act." 450 U.S. at 326.

The Court reiterated these principles in two recent labor law preemption cases. In *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 213 (1985), the Court held that a preemption analysis must focus on whether evaluation of the state tort claim is "inextricably intertwined with consideration of the terms of the . . . contract." Late last term, in *International Brotherhood of Electrical Workers*, 107 S. Ct. at 2168, the Court reaffirmed that the "need for federal uniformity . . . therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action." [8]

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[8] The New Mexico decision would provide an incentive and opportunity for producers throughout the country to recast contractually based claims for relief in areas which continue to be preempted under the NGPA as tort claims in order to circumvent federal regulation. Commentators have noted the increasing convergence of tort and contract causes of action, which will facilitate the opportunities to avert a contract bar by couching a claim in tort. *See* Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 Colum. L. Rev. 377, 401 (1986), G. Gilmore, *The Death of Contract* (1974). It bears noting, in this regard, that the *Arkla* plaintiffs could today frame their pleading as a tort such as breach of the covenant of good faith, a tort recognized in an increasing number of states. *See, e.g., Seaman's Direct Buying Service, Inc.* v. *Standard Oil Co.*, 36 Cal. 3d 752, 686 P.2d 1158, 206 Cal. Rptr. 354 (1984); *EKE Builders, Inc.* v. *Quail Bluff Assocs.*, 714 P.2d 604 (Okla. Ct. App. 1985). Under the New Mexico court's approach, the *Arkla* plain-

The proper inquiry, therefore, does not stop with the form of the claim but must examine whether, as the Court noted in *Allis-Chalmers*, the state court award is "inextricably intertwined" with the federal regulatory regime. The New Mexico court, however, simply drew an artificial tort/contract line. In so doing, the New Mexico court purported to rely on *Arkla* even though *Arkla* neither draws nor implies any such superficial distinction and actually cites a tort preemption case, *Kalo Brick & Tile Co.*, for support. Indeed, it would be remarkable for *Arkla* to stand for such a distinction in light of the Court's other precedent consistently rejecting a categorical analysis in favor of an analysis of the substantive nature of the claim. However desirable it may be to simplify preemption analysis, it cannot be simplified to the point of ignoring the effect of the state action on the federal regulatory system. The New Mexico decision conflicts with the teachings of this Court. The Court should review that decision to reaffirm that Supremacy Clause determinations depend not on form, but on substance.

B. The New Mexico Negligence Standard As Applied Here Is Inconsistent With Uniform Federal Regulation of Natural Gas Sales

Southern Union seeks certiorari in part, as discussed above, because the New Mexico decision conflicts with applicable precedent of this Court. In addition, however, this case warrants certiorari because it independently presents important issues bearing on uniform federal regulation of the gas industry. The New Mexico decision rests on a premise at odds with the concept that all regulated producers are required to know and understand regulatory requirements governing interstate natural gas sales. To find Southern Union liable for negligent mis-

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tiffs would be able to collect damages based on that claim, even if they were measured in the precise way the contract damages in *Arkla* were calculated.

representation under the state standard for negligence, the New Mexico court had to find that Consolidated justifiably relied on the mistaken introductory statement. This determination turns principally on an analysis of Consolidated's obligations and responsibilities as a producer and seller of interstate gas subject to federal regulation. The New Mexico decision on this point assumes, contrary to federal regulation, that a natural gas company may lawfully be ignorant of the jurisdictional status of its gas.

Uniform administration of the NGA and the NGPA depends on the presumption that producers know and conform to the Acts' requirements. An entire section of the Code of Federal Regulations details the obligations of producers to report jurisdictional sales and, depending on the form of rate regulation in effect during the sales period, to charge no more than approved or ceiling rates for the gas. *See* 18 C.F.R. Parts 274, 275 (1987). Under the NGA, once a producer began reporting jurisdictional sales, it could not simply decide that the sales were not, in fact, jurisdictional, and cease complying with federal regulations; it had to seek Commission approval for any change in rates or service.[9] Similarly, only the Commission can approve an increase in the NGPA ceiling rates.[10]

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[9] The NGA provides that a natural gas company subject to its jurisdiction may only charge "just and reasonable rates," 15 U.S.C. § 717c(a) (1982) (App. 72a), that rates must be filed with the Commission "in such form as the Commission may designate," *id.* at § 717c(c) (App. 73a), and that no one may make or abandon interstate sales for resale without Commission approval. 15 U.S.C. § 717f (1982). App. 76a-79a.

[10] The NGPA provides that "[i]t shall be unlawful for any person . . . to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter." 15 U.S.C. § 3414(a) (1982). The Commission has authority, however, to approve higher than maximum lawful prices for gas dedicated to interstate commerce prior to the NGPA if the higher price is "just and reasonable" within the meaning of the NGA. 15 U.S.C. § 3314(b)(2) (1982). App. 83a-84a. Most of the Consolidated gas

As with other areas of the law, natural gas producers are charged with constructive knowledge of statutes, regulations and orders that affect their operations.[11] The New Mexico court nonetheless found that Consolidated, as a federally regulated producer, was justified in relying on an erroneous introductory statement regarding the jurisdictional status of the gas.

The obligations of producers are so intrinsic to the uniform federal scheme that it would create havoc to allow each state to impose a different standard of conduct on producers of natural gas. There would not only be differences between federal and state obligations, but inconsistent standards of conduct among the states themselves.

There is no question here that Consolidated could have resolved its rate dispute with Southern Union in proceedings before the Commission. *See* note 10, *supra*. That route is the appropriate and exclusive one under the federal scheme. *See* App. 25a-26a. By transforming its claim for a higher rate into a state court negligence claim, Consolidated was able to avoid demonstrating that its collection of the higher rate would satisfy the statutory standard that the rate be "just and reasonable." Indeed, the New Mexico state court has no jurisdiction to make such a determination. *See Arkla* at 577. By per-

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at issue here was dedicated to interstate commerce prior to 1978. Some of the gas was produced from wells drilled after the NGPA, and the Commission does not have express statutory authority to permit price increases for that gas. 15 U.S.C. § 3313. *See* App. 81a-82a.

[11] Under the NGPA, any person who "knowingly" violates any provisions of the act may be subject to civil or criminal penalties. 15 U.S.C. § 3414(b), (c) (1982). "Knowing" is defined to mean having "the constructive knowledge deemed to be possesed by a reasonable individual who acts under similar circumstances." 15 U.S.C. § 3414(b)(6)(B)(ii), (c)(5)(B) (1982). App. 84a-88a.

suading the New Mexico courts to approve a lower standard of conduct for a producer, one that effectively discards constructive knowledge of federal regulatory requirements, Consolidated has avoided the appropriate administrative forum. In the process, the New Mexico court has decided incorrectly an issue with serious implications for uniform natural gas regulation.

C. Alternatively, This Case Presents the Issue Expressly Left Unresolved in *Arkansas Louisiana Gas Co.* v. *Hall*

This case may be appropriate for review on the alternative ground that it presents the issue that the *Arkla* Court expressly left unanswered six years ago:

> [W]e are not faced with affirmative misconduct, and we need not consider the application of the filed rate doctrine in such a case.

453 U.S. at 582. The *Arkla* opinion explicitly "save[d] for another day" the question of whether the filed rate doctrine "applies in the face of fraudulent conduct." *Id.*, n.13.

The opinion of the New Mexico Supreme Court treats this case as presenting the unresolved issue of *Arkansas Louisiana* v. *Hall* and thus falling outside the *Arkla* ruling:

> The Supreme Court stated that federal regulation would be undermined if state courts could authorize contractual agreements contrary to a congressionally established scheme. There was no finding in *Arkla*, however, of any intentional misconduct by defendants. In the present case, the trial court awarded damages, not as contract prices, but as consequences for tortious conduct. For this reason, too, *Arkla* does not provide precedent for the case at bar.

As discussed above, *Arkla* is controlling precedent here. The language of the *Arkla* Court regarding the possible exception to its scope dealt only with affirmative miscon-

duct such as fraud. This possible exception for "affirmative misconduct" or "fraudulent conduct" requires something more than negligence, as numerous courts have held in other settings.[12] The possible exception noted in *Arkla* appears more likely to be the one that the Court has elsewhere carved out in federal preemption cases for particularly egregious conduct. *See Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. at 302 (excluding from preemption tortious misconduct which "no reasonable man in a civilized society should be expected to endure").

Nevertheless, if the New Mexico court is correct that this was the issue left unresolved by *Arkla*, this is a particularly appropriate case for the Court to review in order to address that question since it involves interference with federal regulation of natural gas. *Arkla* did involve breach of contract, not tort, and the Court has never expressly extended its reach to tort damage awards. While Southern Union submits that *Arkla*, by dint of its logic and by analogy from other Court precedent, *e.g.*, *Allis-Chalmers*, must apply in negligence cases, it respectfully requests that the Court grant certiorari on the alternative ground that *Arkla*'s applicability to tort cases was the issue "save[d] for another day."

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[12] *Jaa* v. *INS*, 779 F.2d 569, 572 (9th Cir. 1986); *TRW, Inc.* v. *FTC*, 647 F.2d 942, 951 (9th Cir. 1981) (defining affirmative misconduct as "something more than mere negligence"); *Portmann* v. *United States*, 674 F.2d 1155, 1167 (7th Cir. 1982); *Green* v. *United States Dept. of Labor*, 775 F.2d 964, 970 (8th Cir. 1985); *Sederquist* v. *Tahoe Regional Planning Agency*, 652 F. Supp. 341, 347 (D. Nev. 1987) ("affirmative misconduct must be more than negligence.").

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the Supreme Court of the State of New Mexico.

Respectfully submitted,

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Dated: December 12, 1987

87-962

No. _____

SUPREME COURT, U.S.
FILED
DEC 14 1987
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHERN UNION COMPANY,
Petitioner,

v.

CONSOLIDATED OIL & GAS, INC.,
Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

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* *See* note 1 of Petition for Writ of Certiorari.

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 16,037

CONSOLIDATED OIL & GAS, INC.,
Plaintiff-Appellee,
vs.
SOUTHERN UNION COMPANY,
GAS COMPANY OF NEW MEXICO and
SOUTHERN UNION GATHERING COMPANY,
Defendants-Appellants.

[Filed July 9, 1987]

Appeal from the District Court of Santa Fe County
Honorable Art Encinias, District Judge

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OPINION

SOSA, Senior Justice.

Consolidated Oil and Gas, Inc. (Consolidated) sued Southern Union Company (SUC), Gas Company of New Mexico (GASCO), and Southern Union Gathering Company (Gathering) for breach of a Settlement Agreement from a prior price litigation. SUC responded with a request for a reformation of the contract in question on the grounds of "mistake," because federal energy regulation rendered the agreement unenforceable as written. Consolidated then amended its complaint, first to allege fraud and subsequently to allege negligent misrepresentation. SUC answered that the relief requested by Consolidated would still conflict with federal price regulation. After Consolidated had abandoned its contract claim, the trial court found no actual fraud, but entered judgment for Consolidated on the claim of negligent misrepresentation.

SUC appeals to this court. We affirm the judgment of the trial court, but remand for recalculation of prejudgment interest.

The dispute underlying this action involves the intricacies of interstate and intrastate pricing and regulation of natural gas, and the stakes are high. Judgment was for a total of $11,023,967 plus statutory interest. Nevertheless, the primary issue on appeal is simply whether Consolidated reasonably relied on the representations of SUC when it entered into the Settlement Agreement. Put more narrowly, does substantial evidence support the trial court's finding that Consolidated's reliance was justified?

SUC raises three additional issues on appeal:

II. Whether the trial court's decision and damage award are pre-empted by the system of federal regulation of interstate gas sales;

III. Whether the trial court erroneously adopted Consolidated's damage calculations incorporating stripper well prices in excess of those permitted by state law; and

IV. Whether the trial court erred in calculating prejudgment interest.

FACTS

In 1953, SUC spun off its subsidiary, Gathering, which purchased gas from producers in the San Juan Basin. Gathering commingled the gas and resold some interstate through the pipeline of El Paso Natural Gas Company (El Paso) and some intrastate through a parallel pipeline of another SUC subsidiary, GASCO.[1] Some thirty years ago Consolidated began to sell gas to SUC, for resale in both interstate and intrastate markets.

There are four contracts at issue here, dated August 24, 1956, January 1, 1958, September 6, 1960 and November 26, 1960.[2] The 1958 contract was originally between Consolidated and Gathering; SUC assigned the remaining three to Gathering in 1963. At that time, Gathering was reselling most of the gas interstate to El Paso.

FEDERAL JURISDICTION

The Federal Power Commission (FPC or Commission) and its successor, the Federal Energy Regulatory Commission (FERC or Commission) have exercised close con-

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[1] In 1976 Southern Union Gas Company became Southern Union Company and the subsidiary supplying gas to New Mexico customers was renamed Gas Company of New Mexico. In January 28, 1985 SUC sold GASCO to Public Service Company of New Mexico (PNM). Effective the same date, SUC transferred the stock of Gathering to a subsidiary of PNM.

[2] The last contract was severed in 1963 and one part assigned from SUC to Gathering. The portion retained by SUC continued sales entirely intrastate.

trol over pricing and other features of interstate gas sales ever since the Natural Gas Act of 1938 (NGA), 15 U.S.C. § 717.[3] In 1954 the United States Supreme Court upheld the authority of the FPC to regulate sales by independent producers for resale interstate. *See Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

To sell gas interstate, a producer must obtain a certificate of public convenience and necessity from the FPC. 15 U.S.C. § 717 (c). Once a certificate is issued, the gas is "committed and dedicated" to the interstate market and therefore subject to the price ceilings established by the FPC. The gas cannot then be removed from federal regulation unless the FPC approves abandonment. Finally, if intrastate and interstate gas become commingled, then all the gas in the commingled stream is deemed committed to interstate commerce and thereby subject to federal price ceilings and regulation. *See California v. Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) (*Lo-Vaca*).

SUC substantially assisted Consolidated in drafting the applications for certification in 1958 and 1963.[4] At that time the interstate market for gas was stronger and more stable than the intrastate market, although prices in both were comparable. Subsequently, Gathering established an entirely separate "nonjurisdictional system," which originally received deliveries from Consolidated and others for resale interstate. The FPC approved this temporary arrangement for a period of three years. After 1973 this system became exempt from federal regulation as the gas in it was directed to GASCO for resale intrastate.

---

[3] In 1978, Congress passed the Natural Gas Policy Act (NGPA) which continued federal regulation and established prices directly, instead of delegating that function to the FERC. 15 U.S.C. §§ 3313-14.

[4] In 1972, Consolidated independently applied for and obtained from the Commission a single blanket small producer certificate.

With the onset of the "energy crisis" in the early 1970's, the unregulated intrastate prices started to soar, diverging from interstate prices. As a result, in 1974, a number of SUC's suppliers, including Consolidated, brought suit to enforce the most favored nations clauses in their intrastate contracts. Aztec Oil and Gas (Aztec) was SUC's greatest supplier and leading litigant.

Gathering intervened in the action, claiming that SUC had partially assigned to Gathering its interest in the contract dated November 26, 1960. Yet SUC admitted in its answer to Consolidated's complaint that the contract, "certificated" in 1963, involved only intrastate sales. From this and other evidence it can be concluded that SUC possessed the ability to transfer, unilaterally, intrastate gas into a commingled stream subject to certification in interstate commerce.

Consequently, Consolidated grew concerned to learn the ultimate destination of its gas. If it were never commingled with interstate gas, but rather channeled by Gathering into its intrastate or "nonjurisdictional" lines, then federal price ceilings need not apply. The trial court in this case found, and SUC does not seriously challenge, that only SUC could know into which of its parallel pipelines any particular gas was flowing.

SUC obtained a partial summary judgment in the first suit and its producers appealed. While the appeal was pending, in 1976, SUC and Aztec arrived at a settlement in principle to replace the intrastate contracts with new ones giving increased price terms. At the same time, the settlement included a provision for replacing the interstate contracts, not at issue in the litigation, with more modern ones containing pricing and other terms more favorable to producers.

Evidently SUC intended to effectuate similar settlements with Consolidated and the other producers. Accordingly, SUC began to negotiate with Consolidated.

Consolidated made repeated inquiries of SUC to learn whether the gas under the four disputed contracts was in fact flowing in interstate commerce.

SUC prepared a draft agreement dated June 3, 1976, providing higher prices for only the six intrastate contracts in dispute in the producer litigation. The draft set forth the following recital by way of introduction:

> It is recognized that all the gas sold by the Producer under the Contract was resold and consumed solely within the State of New Mexico and therefore such sales by the Producer were not subject to regulation by the Federal Power Commission.

Consolidated rejected this first offer of settlement because it did not include the disputed contracts.

SUC attorneys revised the draft by inserting two provisions: one added the four disputed contracts to the six previously listed; the second increased the lump sum settlement amount for past sales from $544,164.93 to $641,258.12, reflecting the intrastate price differential. Significantly, SUC did not delete or amend the recital that all the gas covered by the contract was intrastate. Dated June 28, 1976, this draft was signed by Oran L. Haseltine, as vice-president of GASCO and Gathering. Relying on SUC's representations, Consolidated signed the second draft, releasing all its litigated claims against SUC. Because GASCO was and is a "public utility" under state law, the Settlement Agreement had to be reviewed and approved by the New Mexico Public Service Commission (PSC). On July 22, 1976, with full public hearing and review, PSC issued its Final Order approving the Settlement Agreement. The Final Order noted that "a strong possibility exist[ed]" that the Supreme Court would rule against GASCO on its appeal of the producer litigation and that therefore stockholders and ratepayers would benefit from a settlement. Furthermore, the Final Order conducted that "[t]he pro-

posed settlement of the producer litigation is fair and reasonable and in the public interest."

Pursuant to the Settlement Agreement and the PSC Final Order, the parties filed a Stipulation of Dismissal in the district court on July 1, 1976. On December 1, 1976, Consolidated demanded payment from SUC of the intrastate price for gas sold under the disputed contracts, consistent with the Settlement Agreement. SUC refused to pay more than the interstate price, stating that federal law dictated such a result.

Consolidated sued, in November 1979, alleging breach of the Settlement Agreement. SUC raised the defense of mutual mistake, and answered that the agreement should be reformed because the gas sold under the disputed contracts had always been, for federal regulatory purposes, "jurisdictional."

In March 1980, SUC moved the trial court to stay the proceedings while their petition was pending before FERC. Consolidated responded by filing a motion to amend its complaint to add a count for fraud and deceit. On August 4, 1980, the trial court granted Consolidated's motion to amend, denied SUC's motion for stay, and referred to the Commission the questions of primary jurisdiction and applicability of interstate price ceilings. The court reserved to itself the "controlling principles of state law with respect to actions at law for fraudulent and deceitful conduct."

Subsequent to taking depositions of SUC representatives, Consolidated moved again to amend its complaint, in August 1984, to include a count for negligent misrepresentation. The trial court granted the motion, and SUC answered with the affirmative defense that the FERC had determined that interstate price ceilings applied to the commingled gas. Therefore, SUC maintained, to pay the higher prices claimed by Consolidated would be to violate federal law.

After a bench trial, the trial court found that SUC had negligently misrepresented the jurisdictional status of the gas and that Consolidated had released its claims against SUC in reasonable reliance on the misrepresentation. The trial court found that Consolidated was damaged in the amount equal to the difference between the interstate price and the amount SUC should have paid if the representations had been true. SUC timely appealed to this Court.

RELATED PROCEEDINGS

A. In March 1980, Gathering petitioned the Commission to assert primary jurisdiction over the suit and to issue a declaratory order that the disputed contracts concerned interstate sales subject to federal price ceilings and that Consolidated should refund the portion of the lump sum payment in excess of the allowable interstate prices. The FERC did not assume primary jurisdiction, but it did ultimately enter an order declaring that the gas sales in question were subject to federal price ceilings under the NGA. 28 FERC Par. 61,225 (1984). On rehearing, the FERC affirmed this order. 30 FERC Par. 61,350 (1985).

Consolidated petitioned for review of the FERC orders to the U.S. Court of Appeals for the District of Columbia Circuit. (No. 85-1191). The appellate court, citing *Lo-Vaca*, affirmed the Commission, holding that federal jurisdiction attached once the gas in question had become commingled with gas flowing in interstate commerce. It is the fact of commingling, not certification, that confers FERC jurisdiction.

It is by now abundantly clear that commingled gas is subject to price ceilings established by the FERC. Therefore, as a matter of law, parties may not contract for the sale of commingled gas at prices exceeding the FERC ceilings. There is thus no cause of action sounding in

contract available to Consolidated to recover the intrastate prices promised in the Settlement Agreement.

B. The Commission itself, however, has consistently declined to entertain this litigation on the merits. After losing in the trial court, SUC petitioned the Commission for a declaratory order that it would violate federal price regulation for Consolidated to collect the damages awarded by the trial court, especially inasmuch as the amount of damages corresponds exactly to the difference between the interstate price ceiling and the intrastate price for the four disputed contracts. On June 19, 1986, the Commission issued an order declaring that the damages awarded by the state court are tort damages and thus do not violate maximum lawful price provisions of the NGPA, nor interfere with the federal regulatory scheme. 35 FERC Par. 61,359 (1986). The Commission rested its decision on the case of *Gulftide Gas Corporation*, 31 FERC Par. 61,288 (1985) (*Gulftide Gas*), in which "the Commission declared that the award of tort damages, whether exemplary or actual, does not conflict with NGPA maximum lawful prices." 35 FERC at Par. 61,822. Furthermore, the order denied SUC's request for a refund of the allegedly excess lump sum payment. *Id.*

SUC filed a request for rehearing with the Commission on July 21, 1986. In its request, SUC again urged that FERC was the preferred forum for Consolidated's claim. By way of its footnote No. 13, SUC suggested that FERC would have had the authority upon a sufficient showing by Consolidated, to approve the prices provided by the Settlement Agreement. Of course this argument runs contrary to the "bright line" of jurisdictional price controls, behind which SUC had sought refuge from its obligations represented in the Settlement Agreement.

Almost summarily, the Commission rejected the request, finding that SUC had presented no new facts or arguments. The Commission explained that it had deter-

mined *Gulftide Gas* to be controlling as precedent, reiterating the principle that the award of damages for misrepresentation in a state law case does not conflict with maximum lawful prices established by the NGA and NGPA.

Finally, in response to SUC's arguments that Consolidated, through "artful pleading," was wilfully mischaracterizing its cause of action to avoid federal jurisdiction and that the Commission saw only a "snapshot" of the whole case, the Commission declared that:

> In making that determination, the Commission reviewed Consolidated's state court damage award, including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles.

I. JUSTIFIABLE RELIANCE

A. On appeal to this Court, SUC characterizes the entire controversy as the result of a "drafting error" in the Settlement Agreement, contending that Consolidated had sufficient independent knowledge not to be misled by the admittedly negligent representation. At no time, however, has SUC provided, either to the trial court or to this Court, a convincing explanation for why its "mistake" came about, or why it went undetected for so long. Consolidated had rejected the first draft because it did not refer to the disputed contracts. That reference was added and the lump sum augmented unilaterally by attorneys for SUC; the draft was signed by an officer of SUC.

There is evidence in the record that SUC was anxious to settle the producer litigation quickly. It is unquestionable that SUC was in the position of superior knowledge, both of the physical distribution of the gas and of its legal and jurisdictional implications. Conceivably, just as SUC had assisted Consolidated in the original certification, and as it had arranged for Gathering to obtain

FPC approval to have one of its pipelines revert to "non-jurisdictional" status, so it might have led Consolidated to believe that similar assistance might be forthcoming to obtain Commission approval to abandon the certification and revert the gas to intrastate sales. The trial court concluded that SUC owed a fiduciary duty to Consolidated to give truthful and accurate information regarding the resale destination of the gas, and that SUC by words and conduct breached that duty.

Furthermore, although the court did not find that Consolidated had proved fraud by clear and convincing evidence as required by law, it did note that there was some evidence of actual or constructive fraud.

B. Finally, it must be emphasized that the events in question occurred in the context of litigation. This was not a simple transaction wherein SUC agreed to buy and Consolidated agreed to sell certain amounts of gas at certain prices. Such a contract, if in fact mistaken, could be rescinded or reformed. Here, however, the consideration given by Consolidated was the value of its claim in the producer litigation. At this juncture it would be impossible to restore the parties to the *status quo ante*. The Settlement Agreement itself formed but a portion of the overall arrangement approved and authorized by the PSC.

In addition, we observe that SUC has enjoyed for some ten years the use of nearly nine million dollars as a result of its misrepresentations. At some moment an end must be declared to these proceedings. SUC asserts that it would be wrong to award Consolidated a "windfall" for relying on representations which it should have known were impossible as a matter of federal regulation. We agree with the trial court that in light of the legal and factual relationships involved, SUC cannot use Consolidated's inadvertance to excuse or justify its own. Accordingly, the judgment of the trial court on this point is affirmed.

II. PRE-EMPTION

SUC contends to this Court, as did Gathering to the Commission, that the pervasive scheme of federal price regulation pre-empts a state court award of damages, citing *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*Arkla*). In that case, the Supreme Court struck down the judgment of a state court that awarded contract damages in excess of federally filed rates. The Commission distinguished *Arkla* because it was decided on the basis of the filed rate doctrine, which is inapplicable to the present proceeding.

We agree. Even more important to our analysis, however, is the distinction established by the *Arkla* court itself. The damages awarded by the trial court in *Arkla* constituted simply the contractual price, which was found to exceed the permissible filed rates. The Supreme Court stated that federal regulation would be undermined if state courts could authorize contractual agreements contrary to a congressionally established scheme. There was no finding in *Arkla*, however, of any intentional misconduct by defendants. In the present case, the trial court awarded damages, not as contract prices, but as consequences for tortious conduct. For this reason, too, *Arkla* does not provide precedent for the case at bar. We join with the Commission in following instead the rule of *Gulftide Gas* that tort damages do not conflict with federally regulated pricing. Finally, we conclude from the foregoing that the federal pre-emption argument advanced by SUC has been effectively answered in the appropriate federal forum.

III. STRIPPER WELL CALCULATION

SUC challenges Consolidated's calculation of damages based on production from "stripper" wells, which were at the time subject to independent price regulation under the New Mexico Natural Gas Pricing Act (NMNGPA).

See Laws 1979, Ch. 97, § 3 and Laws 1977, Ch. 73, § 7 (now repealed). The testimony at trial is in conflict as to the legal effect of the Settlement Agreement on the price to be paid for stripper wells. Consolidated's witness stated that he excluded stripper wells when calculating the price differentials. SUC's witness testified that the NMNGPA would have prevented Consolidated from receiving the full price for stripper wells in December 1978 and January, February and March 1979. SUC asserts that, as a result, Consolidated overestimated its damages in the amount of $38,415.

Our review of the record does not reveal the clear and obvious error claimed by SUC. Moreover, the nature of the suit and the damages awarded by the trial court are such that our affirmance is based not solely on what prices would have been permissible according to contract, but rather on the values Consolidated thought it would receive when it relied on the representations made by SUC. There is substantial evidence to support all the elements of the trial court's calculation of damages.

IV. CALCULATION OF INTEREST

SUC contends on appeal that the trial court erred in its award of pre-judgment interest. The trial court intended to award 6% simple interest, the statutory amount in effect at the time the suit was filed. *See* NMSA 1978, § 56-8-4 (Repl.Pamp.1986). Consolidated concedes that the trial court incorrectly computed the interest award from a calculation incorporating monthly compounding. The result was an award of interest in excess of the statutory rate, contrary to the holding of this Court in *Shaeffer v. Kelton*, 95 N.M. 182, 188, 619 P.2d 1226, 1232 (1980).

Consolidated replies that the overall damages were, if anything, too low in comparison to actual damages incurred. Because of the long time between filing of the

lawsuit and the entry of final judgment, Consolidated claims that it was forced to borrow funds at interest rates well in excess of those computed by the trial court in calculating damages. Consolidated requests this Court to remand the cause to the trial court for an upward revision of the damage award. This we decline to do. The cases Consolidated cites from other jurisdictions do not convince this Court to overturn our holding in *Shaeffer v. Kelton.*

The judgment of the trial court is affirmed and the cause remanded for the sole purpose of recalculating the amount of pre-judgment interest.

IT IS SO ORDERED.

/s/ Dan Sosa, Jr.
DAN SOSA, JR.
Senior Justice

WE CONCUR:

/s/ Harry E. Stowers, Jr.
HARRY E. STOWERS, JR.
Justice

/s/ Mary C. Walters
MARY C. WALTERS
Justice

APPENDIX B

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

No. 16,037

CONSOLIDATED OIL & GAS, INC.,
Plaintiff-Appellee,

vs.

SOUTHERN UNION COMPANY, *et al.*,
Defendants-Appellants.

Friday, August 14, 1987

This matter coming on for consideration by the Court upon Motion of Appellants for rehearing, and Motion for Stay of Mandate pending application for writ of certiorari to the United States Supreme Court, and the Court having considered said motions and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for rehearing is hereby denied.

IT IS FURTHER ORDERED that the motion to stay mandate pending application for writ of certiorari to the United States Supreme Court is hereby granted.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

APPENDIX C

[¶ 61,225]

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CI80-264-000

SOUTHERN UNION GATHERING COMPANY

ORDER RESPONDING TO JUDICIAL REFERRAL AND PETITION FOR DECLARATORY ORDER

(Issued August 20, 1984)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

Southern Union Gathering Company (Gathering Company) filed on March 25, 1980, a petition for declaratory order in this matter. In response, Consolidated Oil and Gas, Inc. (Consolidated),[1] a small producer, filed on May 2, 1980, a protest and on June 20, 1980, a motion to dismiss. Consolidated also filed a timely motion to intervene on June 6, 1980.

The factual background. According to the petition and the other pleadings herein, a dispute arose between

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[1] "Consolidated," as used herein, shall also have reference to predecessors in interest to Consolidated under its gas sales contracts involved in this proceeding.

Consolidated and Gathering Company in 1974 concerning sales of Consolidated's gas in the San Juan Basin, New Mexico, to Gathering Company. The dispute concerned whether certain favored nations pricing provisions in several gas sales contracts between Consolidated and Gathering Company had been activated by gas purchase prices paid by Gathering Company to other producers, so as to entitle Consolidated to higher prices.

In September 1974, Consolidated filed suit against Gathering Company in the State District Court in Santa Fe, New Mexico, alleging breach of these pricing provisions. In 1976, a settlement agreement was entered into between Consolidated and Gathering Company which provided for higher prices under ten Consolidated-Gathering Company contracts, including a lump-sum payment relative to past sales.

Gathering Company alleges that the settlement agreement assumed that all the gas under the ten contracts was sold in intrastate commerce and was therefore not subject to the jurisdiction of the Federal Power Commission, predecessor to the Federal Energy Regulatory Commission. However, Gathering Company later claimed that four of the contracts (hereinafter sometimes referred to as the Consolidated contracts) are subject to this Commission's jurisdiction under the Natural Gas Act and that there was a mutual mistake of the parties in assuming that all of the contracts covered by the settlement involved intrastate gas only. Gathering Company has refused to honor the settlement prices as to these four contracts, insofar as they are higher than the applicable ceiling prices under the Natural Gas Act and the Natural Gas Policy Act of 1978, on the ground that to do so would have been contrary to law.[2]

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[2] The settlement was never submitted to or approved by this Commission.

The Consolidated contracts are dated August 24, 1956, January 1, 1958, September 6, 1960, and November 26, 1960, and are covered by certificates of public convenience and necessity issued by the FPC in 1959 and 1963.[3] On April 17, 1972, and FPC issued Consolidated a blanket small producer certificate, and subsequently all sales under the Consolidated contracts were made under this certificate. An order issued October 18, 1972, terminated the original certificates covering these sales and cancelled their rate schedules.[4]

Gathering Company owns and operates gas gathering facilities in the San Juan Basin of New Mexico through which gas, including gas under the Consolidated contracts, is purchased from Consolidated and other producers and gatherers. The resultant commingled gas stream is sold by Gathering Company in part to Gas Company of New Mexico, a division of Southern Union Company, and in remaining part to El Paso Natural Gas Company (El Paso). The gas sold to Gas Company is consumed within the State of New Mexico, while the portion sold to El Paso is transported and resold in interstate commerce by El Paso.[5]

Consolidated again filed suit in 1979 against Gathering Company in the State District Court in Santa Fe,

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[3] The Consolidated contracts were all executed prior to April 3, 1961, the date on and after which price escalation clauses in jurisdictional gas sales contracts were prospectively made inoperative, subject to certain stated exceptions not relevant here. Contracts with such clauses executed on or after April 2, 1962, are subject to rejection if filed as rate schedules. *See*: 18 C.F.R. § 154.93.

[4] The small producer blanket certificate procedure was established by Commission Order No. 428, 45 FPC 454, issued March 18, 1971. It is codified at 18 C.F.R. § 157.40.

[5] The gas purchased by Gathering Company under the other contracts involved in the settlement, but not involved in the dispute here, apparently is transported by Gathering Company through its separate intrastate line.

New Mexico, alleging a breach of the 1976 settlement agreement because of the failure of Gathering Company to pay the full prices thereunder.[6] Gathering Company answered this complaint, denying liability. Gathering Company also filed a motion in the court to stay proceedings therein pending Commission action on the subject petition. Consolidated later filed a motion to amend its complaint in the court action to include a cause of action based on fraud and deceit, essentially growing out of the facts summarized above.

The Court denied Gathering Company's motion to stay except with regard to the following stated issues, which it "referred to FERC for examination and determination on the basis of primary jurisdiction:"

> "(a) Whether all or any portion of natural gas sold by Consolidated to Defendants pursuant to four (4) natural gas purchase contracts dated August 24, 1956, January 1, 1958, September 6, 1960 and November 26, 1960, as amended, is subject to the jurisdiction of FERC pursuant to the Natural Gas Act, the Natural Gas Policy Act, or rules and regulations promulgated in accordance therewith;
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> "(b) In the event that all or any portion of such natural gas is subject to FERC jurisdiction, the applicable prices payable by Defendants to Consolidated under the referenced statutes and regulations, absent controlling principles of state law with respect to actions at law for fraudulent and deceitful conduct."

Gathering Company, in its petition for declaratory order, requests that the Commission issue an order declaring that the Commission has primary jurisdiction over this case; that the sales of gas by Consolidated at issue are not sales in intrastate commerce, but are sales

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[6] *Consolidated Oil & Gas, Inc. v. Southern Union Company, et al.*, No. SF79-2161(c).

in interstate commerce for resale subject to Federal rate regulation on that basis; and that Gathering Company cannot lawfully pay and Consolidated cannot lawfully collect rates in excess of those allowed by Federal rate regulation. Gathering Company further requests that Consolidated be required to refund to it any rates paid by Gathering Company under the 1976 settlement which were in excess of Federally allowed rates.

We turn first to the questions raised by the Court. There is no real dispute as to the jurisdictional status of Consolidated's subject sales. Consolidated does not assert that these sales are outside this Commission's jurisdiction under the Natural Gas Act.[7]

The Supreme Court held in *F.P.C. v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965), that where a supplier sells natural gas to an interstate pipeline company which commingles it with gas from other sources and uses some of the mixture intrastate but sells a substantial portion thereof in interstate commerce, the parties may not avoid the jurisdiction of the Commission by stipulating in their contract that, contrary to the actuality of pipeline transportation, all the supplier's gas sold under the contract will be used intrastate. That case followed shortly after *California v. Lo-Vaca Co.*, 379 U.S. 366 (1965), which held essentially the same thing. Thus, we think it beyond doubt that all natural gas sold by Consolidated pursuant to the four contracts in question is subject to the jurisdiction of the Commission under the Natural Gas Act by virtue of the fact that Gathering Company commingles such gas wih other

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[7] Consolidated does question the applicability of the doctrine of primary jurisdiction here, as well as the Commission's authority to take control over a state court proceeding involving issues of alleged breach of contract and alleged fraudulent representation. These matters are discussed later in this order.

gas and sells a portion of the commingled stream to El Paso for resale in interstate commerce.[8]

As to the Court's second question, the lawful rate for these sales is the contract rate or the applicable ceiling rate, whichever is lower. The permanent certificates issued to Consolidated covering sales under the Consolidated contracts were terminated and its rate schedules relating thereto cancelled after issuance to Consolidated of a blanket certificate of public convenience and necessity in 1972. Therefore, this Commission does not have adequate information to calculate Consolidated's contract rates. We can, however, set forth the applicable ceiling rates. According to the pleadings, the time period involved in sales under the pertinent contracts is from January 1, 1974. During that period, the ceilings on small producer sales from the San Juan Basin in New Mexico, Rocky Mountain Area, are described below.

Under the small producer procedure, small producers were permitted to charge and collect their contract rates after promulgation of such procedure in 1971 by Order No. 428 (see footnote 4, *supra*).[9] However, small producers were precluded under Order No. 428 from using contract escalation clauses prohibited by subsections (a), (b), (b-1) and (c) of 18 C.F.R. § 154.93 (which would include favored nation clauses such as those in the Consolidated contracts) from collecting any rate in excess of the otherwise applicable ceiling price. That provision applied without regard to whether the contracts involved

[8] It may be that some of the subject gas sold by Consolidated has become exempt from the provisions of the Natural Gas Act pursuant to Section 601(a)(1)(B) of the Natural Gas Policy Act of 1978 (NGPA). However, any such exempted gas would remain subject to the applicable NGPA price ceiling unless deregulated in accordance with NGPA Section 121.

[9] A small producer was not limited to the just and reasonable ceiling rate where its contract rate exceeded that level until the issuance of Opinion No. 742-A on July 27, 1976 [56 FPC 637].

were executed before or after April 3, 1962. *See* Section 157.40(e), 45 FPC at 460-461.

During the period involved here, the producer rate ceilings applicable to the Rocky Mountain Area were:

(1) 24.0 cents per Mcf at 14.73 psia for gas sold under contracts dated prior to October 1, 1968, which is produced from wells commenced on or before December 31, 1972, subject to applicable adjustments. Opinion No. 658, 49 FPC 924, issued April 11, 1973, as amended.

(2) 24.00 cents per Mcf at 15.025 psia for gas sold under contracts dated prior to October 1, 1968, which is produced from wells commenced after January 1, 1973, subject to applicable adjustments. Order No. 435, 46 FPC 68, issued July 15, 1971.

(3) Effective June 21, 1974, 50 cents per Mcf at 14.73 psia for gas sold from wells commenced on or after January 1, 1973, with one cent annual escalations on January 1 of each year (51 cents in 1975, 52 in 1976, *et seq.*), subject to applicable adjustments. Opinion No. 699-H, 52 FPC 1604, issued December 4, 1974, as amended.[10] This rate was also available for gas sold under a replacement contract, *i.e.*, a contract replacing a prior contract where the prior contract expired of its own terms on or after January 1, 1973, or where the prior contract expired prior to January 1, 1973, but the replacement contract was executed on or after January 1, 1973.

(4) By Commission Opinion No. 742, 54 FPC 853, issued August 28, 1975, as amended, the Commission

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[10] With the issuance of Opinion No. 699-H, the rate provided in Order No. 435 was superseded, as of June 21, 1974, insofar as the subject sales are concerned, because any sales from wells commenced on or after January 1, 1973, would be entitled to the 50 cent rate provided in Opinion No. 699-H, in lieu of either the Order No. 435 rate or the 35 cent Rocky Mountain rate established in Opinion No. 699-H for contracts dated on or after October 1, 1968.

established just and reasonable rates for small producers at 130% of the large producer rates, effective as of August 28, 1975. Section 157.40(e), 54 FPC 853, 862-3, was amended to preclude use of prohibited indefinite pricing provisions (18 C.F.R. § 154.93) to exceed these new ceilings. The 24 cent rate under Opinion No. 658 thus rose to 31.2 cents per Mcf, subject to applicable adjustments; and the 51 cent rate under Opinion No. 699-H rose to 66.3 cents per Mcf, subject to applicable adjustments.

(5) Effective July 1, 1976, the 24.0 cents per Mcf rate prescribed by Opinion No. 658 referred to above was increased to 29.5 cents per Mcf at 14.73 psia, subject to applicable adjustments.[11] Opinion No. 749, 54 FPC 3090, issued December 31, 1975, as amended. By operation of Opinion No. 742, *supra*, this rate became 38.35 cents per Mcf for small producers, subject to applicable adjustments.

(6) Effective July 27, 1976, the small producer flowing gas rate, i.e., the 38.35 cent rate described next above (130% x 29.5 cents per Mcf) was changed to 35 cents per Mcf at 14.73 psia, subject to applicable adjustments. Opinion No. 742-A, 56 FPC 637, issued July 27, 1976, as amended, and Order No. 553, 56 FPC 654, issued July 27, 1976, as amended.[12] The 35 cent rate is not subject to the 130% provision in Opinion No. 742.

(7) Effective July 27, 1976, the 52 cent rate then in effect under Opinion No. 699-H, described above, was increased to 93 cents per Mcf at 14.73 psia, subject to

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[11] In those situations where the Btu content of the gas exceeded 1021 Btu, the 23.5 cents per Mcf rate at 14.73 psia provided in Opinion No. 749, effective as of January 1, 1976, would be higher than the 24 cent rate under Opinion No. 658 because of differences in the permitted Btu adjustments under those opinions. The higher rate would be the applicable ceiling rate as of January 1, 1976.

[12] *See* 18 C.F.R. § 157.40(c)(1)(i).

applicable adjustments, for gas from wells commenced on or after January 1, 1973, and prior to January 1, 1975. A January 1 one cent per Mcf annual escalation was provided, beginning January 1, 1977. The 130% provision in Opinion No. 742 was applicable to the 93 cent rate and yearly one cent escalations thereto, thus resulting in a rate of 120.9 cents per Mcf, which was in effect until January 1, 1977, when the rate would escalate 1.3 cents per Mcf. Opinion No. 770, 56 FPC 509, issued July 27, 1976, as amended; and Opinion No. 770-A, 56 FPC 2698, issued November 5, 1976, as amended.

(8) Also effective July 27, 1976, a rate ceiling of $1.42 per Mcf at 14.73 psia, subject to applicable adjustments, was prescribed for sales by both large and small producers from wells commenced on or after January 1, 1975. Quarterly one cent escalations were provided commencing October 1, 1976. Opinion Nos. 770 and 770-A, as amended, *supra*. The 130% provision in Opinion No. 742 did not apply to this vintage gas.

(9) Effective as of December 1, 1978, the ceilings prescribed in the NGPA apply. These rates are set forth in tabular form in 18 C.F.R. § 271.101. They escalate monthly pursuant to the monthly inflation adjustments provided in the NGPA.

We now turn to Gathering Company's petition. Gathering Company requests that this Commission assume jurisdiction of this case on the grounds of primary jurisdiction. In *Arkansas Louisiana Gas Company v. Hall*, 7 FERC ¶ 61,175, at p. 61,322 (1979),[13] the Commission held with respect to sales subject to its jurisdiction under the Natural Gas Act that:

> Whether the Commission should assert jurisdiction over contractual issues otherwise litigable in state

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[13] Order affirmed in *Arkansas Louisiana Gas Company v. F.E.R.C.*, D. C. Cir. Nos. 77-1146 and 79-2068 (unreported orders of October 19, 1981, and May 28, 1982).

courts, depends, we think, on three factors. Those factors are: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decision; (2) whether there is a need for uniformity of interpretation of the type of question raised by the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.

Viewed by these standards, we see no reason to exercise jurisdiction over the contractual aspects of this case. As in *Arkla v. Hall*, the favored nations clauses in the Consolidated contracts do not require special expertise for their construction; there is no need for uniformity of construction; and the case is not important to the regulatory responsibilities of the Commission.

The filed rate doctrine, as such, does not specifically apply to any rate permitted under Consolidated's small producer certificate inasmuch as no rate filings are required thereunder.[14] But Consolidated is limited under its small producer certificate to its contract rate or to the applicable ceiling price, whichever is lower. Consequently, Consolidated would have no right under either the filed rate doctrine or its certificate authorization to collect a rate in excess of its contract rate or the applicable ceiling price, whichever is lower, in the absence of specific authority from this Commission.[15] If a court were to award damages for breach of contract on the basis of a rate in excess of that permitted under Consolidated's certificate, Consolidated would be required to seek specific authorization from this Commission before

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[14] Under the filed rate doctrine the utility "can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms." *Montana-Dakota Utilities Co. v. Northwestern Public Service Co.*, 341 U.S. 246 (1951).

[15] *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571 (1981).

collecting any such rate.[16] No authorization would be required, however, in the event the damages awarded by the court did not exceed the rate authorized under the certificate.[17]

We now turn specifically to the fraud allegations. Fraud, in addition to breach of contract, was considered in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 511 (1981), but was found not to exist. On this subject the Court said, p. 583:

> The court below did not find that Arkla intentionally failed to inform respondents of its lease payments to the United States in an effort to defraud them. Consequently, we are not faced with affirmative misconduct, and we need not consider the application of the filed rate doctrine in such a case.[13]
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> * * *

[13] . . . We save for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct.

Although the question of fraud has been raised by Consolidated in the current court litigation, that matter has not yet been resolved. If the court were to determine that there was fraudulent conduct on the part of Gathering Company in this case and that any damages relating

[16] Aside from the heavy burden Consolidated would have in justifying a higher rate, there would also be a serious question as to whether such higher rate, even if justified, could or should be made retroactively effective.

[17] We have taken no action on Gathering Company's request to require Consolidated to make refunds of any rates paid in excess of the applicable ceiling rate under the 1976 settlement. Gathering Company has not supplied adequate information showing that there were any excess payments. Moreover, in any event, we presume that the Court will allow Gathering Company to offset whatever excess payments, if any, were made by Gathering Company against whatever damages, if any, are awarded Consolidated.

thereto would have the effect of increasing Consolidated's rate above the applicable ceiling rate or above Consolidated's contractually authorized rate, whichever is lower, it would then become necessary to decide whether this Commission should exercise jurisdiction over such matters. In these circumstances, the court would have an opportunity to refer the question to this Commission. In the alternative, either Consolidated or Gathering Company would also have an opportunity to raise the issue in appropriate pleadings with this Commission.

The Commission orders:

(A) The Commission's response to the questions raised by the New Mexico State District Court is set forth in the body of this order.

(B) Gathering Company's request for declaratory order is granted to the extent provided in the body of this order.

(C) Consolidated's motion to intervene is granted subject to the Rules and Regulations of the Commission: *provided, however,* that its participation shall be limited to matters affecting asserted rights and interests as set forth in the motion to intervene; and *provided, further,* that its admission shall not be construed as recognition that it might be aggrieved by any order entered in this proceeding.

APPENDIX D

[¶ 61,350]

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CI80-264-001

SOUTHERN UNION GATHERING COMPANY

ORDER DENYING REHEARING AND MOTION FOR CONSOLIDATION AND HEARING

(Issued March 22, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman, Georgiana Sheldon, A. G. Sousa, Oliver G. Richard III and Charles G. Stalon.

On September 13, 1984, Consolidated Oil & Gas, Inc. filed a request for rehearing of the Commission's order entitled "Order Responding to Judicial Referral and Petition for Declaratory Order" issued in the above-captioned proceeding on August 20, 1984. 28 FERC ¶ 61,225. The Commission in that order held that four sales of natural gas by Consolidated to Southern Union Gathering Company (Southern Union) in San Juan County, New Mexico were sales for resale in interstate commerce and therefore subject to Commission jurisdiction under the Natural Gas Act. The Commission set forth the ceiling prices applicable to the sales, but elected not to exercise

jurisdiction over contractual aspects of the case which were the subject of ongoing state court litigation initiated in 1974 by Consolidated against Southern Union in New Mexico. The Commission stated that Consolidated would have no right to collect a rate in excess of its contract rate or the applicable ceiling price, whichever is lower, in the absence of specific authority from the Commission.

In its request for rehearing, Consolidated challenges the August 20 order on numerous grounds, alleging that the order (1) improperly denies Consolidated a hearing, (2) contains factual errors, (3) is not based on substantial evidence, (4) represents an abuse of discretion, (5) attempts to "seize authority" over the issue of possible damage awards, (6) represents an improper intrusion on state courts, and (7) represents an unsupported change in Commission policy. A review of the request for rehearing reveals three principal areas of controversy, namely (1) the jurisdictional issue, (2) the need for a hearing, and (3) the possible effect of the August 20 order on state court proceedings.

Jurisdiction

In the August 20 order, the Commission held the sales in question to be jurisdictional because the gas purchased from Consolidated was commingled by Southern Union with other gas and resold in part to El Paso Natural Gas Company (El Paso) for resale in interstate commerce.[1] In support of this jurisdictional determination, the Commission relied upon *F.P.C. v. Amerada Petroleum Corp.*, 379 U.S. 687 (1965) and *California v. Lo-Vaca Co.*, 379

[1] Consolidated applied for and received in 1959 and 1963 certificates of public convenience and necessity for each of the four sales in question and thereafter continuously sold gas under these certificates to Southern Union. In 1972, Consolidated received a small producer certificate and its prior certificates and rates schedules were cancelled. The sales have continued under the small producer certificate.

U.S. 366 (1965). These cases hold that where gas is sold to and commingled with the system supply of an interstate pipeline, the sale is jurisdictional even though the parties may purport to allocate the gas to non-jurisdictional sales or activities. Consolidated argues that (1) the *Amerada* and *Lo-Vaca* cases are inapplicable since a "substantial" portion of the gas is not sold in interstate commerce and Southern Union is a non-jurisdictional gathering company rather than an interstate pipeline, (2) the jurisdictional finding is in conflict with the Commission's order in *Columbia Gas Transmission Corp.*, 10 FERC ¶ 61,111 (1980), and (3) the jurisdictional finding is inconsistent with the intent of the parties.

Upon review of these arguments, the Commission finds they provide no basis for modifying the jurisdictional determination made in the August 20 order. Information submitted in this case shows that during the two-year period from March 25, 1976 to March 25, 1978, a total of 142,048,924 Mcf of gas flowed through Southern Union's facilities, of which 48,690,185 Mcf was sold to El Paso.[2] Furthermore, the fact that Southern Union is not an interstate pipeline is not controlling.[3] The fact remains that Consolidated's sales to Southern Union are sales for resale by Southern Union to El Paso for resale in interstate commerce. The sale of gas prior to gathering is jurisdictional if the sale is made in interstate commerce. *Deep South Oil Company of Texas v. F.P.C.*, 247 F.2d 882 (5th Cir. 1957), *cert. den.*, 355 U.S. 930 (1958); *United Gas Improvement Co. v. Continental Oil Co., et al.*, 381 U.S. 392 (1965). The *Columbia* case re-

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[2] Brief of Southern Union in support of petition for declaratory order, filed March 25, 1980, p.4.

[3] In 1972, the Commission determined that Southern Union was an independent producer "engaged in the gathering of natural gas and the sale of natural gas in interstate commerce but is not engaged in the transportation of natural gas, other than gathering, by pipeline in interstate commerce." 47 FPC 1177, 1196 (1972).

lied upon by Consolidated does not require a different result. In *Columbia*, the Commission held the sale of gas by a producer directly to a local distributor in the same state to be non-jurisdictional even though the gas was transported by an interstate pipeline for the distributor and commingled in the pipeline with interstate gas. The Commission thus refused to extend the *Lo-Vaca* commingling theory to a case in which it had jurisdiction over the transportation of the gas, but not over the sale of such gas. Here, Consolidated's gas is sold to Southern Union and resold by it to El Paso for resale in interstate commerce. Under these circumstances the *Columbia* exception to *Lo-Vaca* does not apply.

With regard to the question of intent, the Commission holds that the parties' intent is not a relevant factor in determining whether these sales are jurisdictional. The record in this case does not support the claim that Southern Union intended that the sales in question would be non-jurisdictional; its 1980 petition for a declaratory order seeks a determination that the sales are jurisdictional. However, even assuming *arguendo* that both parties agreed that Consolidated's sales were non-jurisdictional, that fact would not be controlling. Jurisdiction must be determined based on the facts of the particular case and the application of legal principles to those facts. For the reasons set forth in the August 20 order and restated here, the sales under these four contracts are jurisdictional. That finding cannot be affected at this late date by controverted arguments about the intent of the parties.

In connection with the jurisdictional issue, the Commission takes note of the declaratory order issued on May 5, 1981, in Docket No. CI81-22-000. 15 FERC ¶ 61,132. In that order, the Commission held that Southern Union's participation in certain exchanges of natural gas with Northwest Pipeline Corporation (Northwest) and El Paso constituted gathering not subject to Commission ju-

risdiction pursuant to section 1(b) of the Natural Gas Act. In that case Consolidated, as an intervenor, had expressed concern about its jurisdictional status in the event the exchanges were found to be jurisdictional. (Consolidated makes nonjurisdictional as well as jurisdictional sales to Southern Union in the San Juan Basin). In its order, the Commission held that "In light of our determination that Southern Union is not jurisdictional in these circumstances, we believe that producers such as Consolidated, who sell gas to Southern Union in New Mexico, are also non-jurisdictional." 15 FERC at p. 61,301. This case in no way supports a determination that the four contracts at issue here are non-jurisdictional. The language quoted from the May 5, 1981 order was meant to allay producer concerns by confirming that the jurisdictional status of sales to Southern Union would not be affected by the exchanges to be made between Southern Union, Northwest and El Paso. To the extent such sales were non-jurisdictional they would remain so. However, the order was in no way intended and cannot reasonably be interpreted to mean that previously jurisdictional sales by producers to Southern Union would become non-jurisdictional as a result of the exchanges.

One final matter pertaining to the jurisdictional issue merits consideration. Consolidated states that Southern Union has agreed that sales made under the November 26, 1960 contract are, at least in part, non-jurisdictional. While it is true that certain sales under this contract are non-jurisdictional, that fact has no effect on the jurisdictional finding made in the August 20 order. Southern Union was not the original buyer under the November 26, 1960 contract, as well as two of the other contracts, but succeeded to the interest of the original buyer, Southern Union Company, its parent. Southern Union did not succeed to all of the parent company's interest under the November 26, 1960 contract; the parent remained the

purchaser of gas from some of the acreage. This gas was not certificated by the Commission, is not sold to Southern Union, and is not involved in this proceeding. The jurisdictional finding applies only to gas sold under these contracts to Southern Union.

Need for a Hearing

Consolidated argues that it was denied due process of law because no formal hearing was held prior to issuance of the August 20 order. Consolidated argues that substantial and material facts remain to be determined and that a hearing is therefore required. A review of the request for rehearing, however, reveals that Consolidated has not alleged, except in the most general terms, the existence of factual issues alleged to require a hearing. Consolidated argues that "factual issues concerning the intent of the parties and of Gathering Company's facilities are in dispute . . ." (p. 14). At another point, Consolidated states that "the Commission's finding [concerning the price escalation clauses in the contracts] cannot be made without a hearing in which the parties' interpretation of the contracts are ventilated fully." (p. 20).

The Commission finds that a hearing is not required. Allegations such as those made by Consolidated do not mandate a formal hearing.[4] Consolidated has not shown that disputed issues of material fact exist which would require a hearing. Consolidated has not demonstrated or even described any factual issues concerning Southern Union's facilties which would affect the jurisdictional determination. The Commission has found that the question of intent is not determinative of the jurisdictional issue. With regard to the issue of interpretation of the price escalation provisions of the contract, it is equally

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[4] Southern California Edison Co., 27 FERC ¶ 61,105 (1984); City of Ukiah, California v. F.E.R.C., 729 F.2d 793 (D.C. Cir. 1984); Cerro Wire & Cable Co., et al. v. F.E.R.C., 677 F.2d 124 (D.C. Cir. 1982).

clear that a hearing is not required. In the August 20 order, the Commission noted that pursuant to Order No. 428, 45 FPC 454 (1971), small producers were permitted to collect their contract rates, but were precluded from using certain contract escalation clauses, including favored nations clauses of the type contained in the four contracts, to collect rates in excess of the otherwise applicable ceiling price. The only price escalation clauses permitted are those set forth in section 154.93 of the Commission's regulations. In the August 20 order the Commission reviewed the price escalation clauses in the four contracts and determined that they do not fall within any of the categories described in section 154.93 and are therefore prohibited. The Commission does not believe this conclusion involves a factual issue as to which there is or could be any genuine dispute. The clauses in question are clearly favored nations clauses and fall squarely within the prohibition of Order No. 428 and section 154.93 of the regulations.[5] To hold a hearing on this

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[5] The price escalation clause in the September 6, 1980 contract is quoted below. The other contracts have similar or identical clauses.

PRICE EQUALIZATION

> Any other provision in this agreement to the contrary notwithstanding, if at any time while this agreement remains in effect Buyer shall purchase at the wells gas which is produced within Northwestern New Mexico by any other(s) than Seller from the field and horizon which produces the gas purchased hereunder, at a higher price (including, for this purpose, Buyer's reimbursement, if any, of tax cost to such other seller(s)) than is being paid to Seller hereunder for gas produced from such field and horizon (including, for this purpose, Buyer's reimbursement, if any, of direct tax cost to Seller) and Seller's gas from such source delivered hereunder (1) is delivered under similar conditions, giving due consideration to quality, volume and pressure, and (2) is equivalent to or better than such other gas, then Buyer shall pay such higher price to Seller for its gas delivered hereunder from such

question would constitute a waste of time and is therefore unnecessary.

Effect on State Court Proceedings

In its original petition of March 25, 1980, Southern Union requested the Commission to issue a declaratory order holding, among other things, that:

> Consolidated cannot lawfully receive and Gathering Company cannot lawfully pay prices for the gas sold under the Consolidated Contracts which are in excess of the maximum prices permitted under the provisions of such Acts [NGA and NGPA] and the Commission's regulations applicable to interstate sales of gas for resale.

In the August 20 order, the Commission granted Southern Union's request. 28 FERC at p. 61,427. The Commission also stated that in the event a court awarded damages to Consolidated for breach of contract on the basis of a rate in excess of that permitted under Consolidated's certificate, Consolidated would be required to seek authorization from the Commission before collecting such rate. The Commission stated that Consolidated would have a heavy burden to justify an above-ceiling rate and that a serious question existed as to whether such a rate could or should be made effective retroactively. 28 FERC at p. 61,428, n. 16. The Commission also held open the possibility that it would review any damages based on fraud. *Ibid.* at pp. 61,427-28.

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source, for so long as it shall pay that price to such other(s). In determining whether any higher price is being paid by Buyer for purposes of this Article VIII the units of gas measurements shall be computed to the same pressure base and there shall be disregarded any excess or premium amounts paid or required to be paid on account of gas royalty or overriding royalty or on account of liquefiable hydrocarbon content specifically recognized.

Consolidated argues that these statements are unwarranted and represent an improper intrusion on the New Mexico District Court. Consolidated challenges the August 20 order on the following grounds: (1) the order improperly suggests that damages for breach of contract may not be awarded if the amount awarded results in a per unit of gas rate in excess of the applicable ceiling price, (2) the order implies that damages awarded for fraud or deceit may be reviewable by the Commission, (3) the order predetermines that any damages awarded would have the effect of raising Consolidated's rates above the applicable ceiling, and (4) the Commission's statements concerning damages are at odds with the concept of tort law, where the issue is the conduct of a defendant rather than the price of a commodity.

Upon review of this matter, the Commission concludes that Consolidated's arguments do not warrant modification of the August 20 order. However, the Commission agrees that the language contained in the August 20 order may be to some extent misleading and open to a broader interpretation than was intended. The Commission will therefore clarify the matter. The August 20 order held that Consolidated would be required to seek Commission approval in the event a court were to award damages "on the basis of a rate in excess of that permitted under Consolidated's certificate." 28 FERC at p. 61,427. The Commission did not mean to imply by that statement that an award of damages based on breach of contract or other grounds would or would not be construed as exceeding the applicable ceiling price. The Commission will not speculate about such matters in the absence of an actual damage award.

It is not clear whether or, if so, when the issue of Commission authority in relation to an award of damages by a state court will come before the Commission. The Commission believes no useful purpose can be served by attempting to delineate in advance the issues

which such a case would present or what action the Commission might take. Any Commission action would depend on a number of factors including the amount of damages, the basis for the damages, and the relevant facts and circumstances and applicable legal principles. We leave those matters for another day. It is sufficient for present purposes to state that in issuing the August 20 order the Commission did not intend either to waive its jurisdiction over Consolidated's sales and the rates at which those sales are made or to intrude upon the jurisdiction or authority of any state court.

Consolidated also argues that the August 20 order represents an unsupported change in Commission policy with regard to the exercise of primary jurisdiction. This claim is without merit. The Commission's policy is to rule on issues presented or referred to it in cases where the issues involve matters important to the Commission's regulatory responsibilities or as to which the Commission has special expertise. *United Gas Pipe Line Company*, Docket No. RP71-29, *et al.* (Phase III), 4 FERC ¶ 61,151 (1978); *Transcontinental Gas Pipe Line Corp.*, Docket No. TC79-8, 13 FERC ¶ 61,147 (1980). Absent these factors, or other special circumstances in a particular case, the Commission would not assert or accept jurisdiction over issues pending in state or federal courts. The August 20 order represents no departure from that policy. The issues ruled on in the August 20 order were referred by the state court to the Commission and are matters clearly within the Commission's primary jurisdiction. The Commission ruled that Consolidated's four sales, made under Commission certificates, were jurisdictional under the Natural Gas Act; stated the applicable ceiling prices; and stated that Consolidated is entitled to no more than the ceiling prices for these sales. These are issues central to the Commission's regulatory responsibilities. The Commission declined to exercise jurisdiction over any other issues involved in the state court proceedings.

The United Gas Pipe Line Company case, 27 FERC ¶ 61,015 (1984), relied on by Consolidated in support of its argument that the August 20 order represents a change in Commission policy, is not on point. In the *United* case, the Commission was requested by the plaintiff in a pending lawsuit against United to issue a declaratory order "clarifying the intent" of the Federal Power Commission in issuing Opinion Nos. 610 [47 FPC 245], 610-A [47 FPC 1021], 661 [50 FPC 181], and 661-A [50 FPC 779] in 1972 and 1973. The Commission declined to so do, stating that the court neither needed nor wanted the Commission's assistance. The facts and circumstances present in *United* are clearly distinguishable from those in this case, and the *United* case is therefore not a valid precedent with respect to the August 20 order. Consolidated also claims that the Commission asserted jurisdiction herein in violation of our policies and precedents. We declined to take jurisdiction over the contractual aspects of this case under the precedent fully articulated in *Arkla v. Hall*, 7 FERC ¶ 61,175 (1979).[6]

Consolidated further alleges that our August 20 order runs counter to positions taken by the FERC recently in similar cases—*In re Tenneco Inc.*, No. 84-4074, (1984) and *In re Columbia Gas Transmission Corp.*, No. 84-3282, (1984) both before the Fifth Circuit. These cases involved situations where natural gas pipeline companies, alleging reduced demand for gas, instituted temporary or emergency programs to reduce gas costs and purchases from their producer-suppliers and to obtain relief from contractual obligations to pay such producer-suppliers for minimum volumes of gas whether taken or not. These matters are the subject of proceedings before the Commission. The producers involved sued under their

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[6] Order affirmed in *Arkansas Louisiana Gas Company v. F.E.R.C.*, D. C. Cir. Nos. 77-1146 and 79-2068 (unreported orders of October 19, 1981, and May 28, 1982).

gas purchase contracts. The pipeline companies sought to have the district judges refer to this Commission the issues regarding their purchasing programs under the doctrine of primary jurisdiction. Participating in these case as *amicus curiae*, the Commission, *inter alia*, opposed these efforts on the ground that reference at that time would have disturbed the orderly proceedings of cases pending before the Commission involving similar issues, but not ripe for decision. The Court of Appeals refused to authorize referral of any issues in the District Court cases to the Commission.

Motion for Consolidation and Hearing

On December 21, 1984, Consolidated filed a motion requesting the Commission to consolidate this case with Southern Union's pending case in Docket No. GP84-55-000 for the purpose of hearing and decision. The GP84-55-000 case involves a petition filed on September 21, 1984, by Southern Union requesting the Commission to issue a declaratory order stating, among other things, that Southern Union does not require either certificate or abandonment authorization under the Natural Gas Act in order to sell to other parties gas which is in excess of El Paso's requirements. Consolidated argues that there are common issues of law and fact requiring consolidation of the proceedings for hearing. Consolidated points out that the two proceedings involve "the same gas, the same contracts, the same facilities, the same producers, the same purchaser and the same customers." Consolidated also argues there are common issues of law and policy, the "most critical" of which concerns the proper price to be charged by Southern Union for sales to parties other than El Paso.

On January 15, 1985, Southern Union filed an answer in opposition to Consolidated's motion for consolidation and hearing together with a motion for extension of time within which to file the answer. On January 31, 1985,

Consolidated filed an answer to Southern Union's motion for extension of time. Consolidated opposes Southern Union's request for extension of time and argues that the granting of such an extension is contrary to usual Commission practice and that Southern Union failed to demonstrate good cause. Upon review the Commission finds no basis to reject Southern Union's answer. Southern Union has demonstrated good cause to permit its answer to be accepted for filing and such acceptance in no way prejudices the rights of Consolidated. On February 8, 1985, Southern Union filed a motion to strike those portions of Consolidated's January 31 answer which contained arguments directed not to Southern Union's January 15 motion for extension of time but to its answer concurrently filed in opposition to Consolidated's motion for consolidation and hearing. Southern Union points out that under Rule 213(a)(2) Consolidated is not permitted to file an answer to Southern Union's January 15 answer unless permitted by the Commission. Upon review of this matter, the Commission will accept Consolidated's answer of January 31, 1985 for filing.

Consolidated's motion for consolidation and hearing will be denied. Consolidated presents no new facts or arguments based on Southern Union's petition in Docket No. GP84-55-000 which would lead to a different result on the jurisdictional issue in this case. Nothing in Southern Union's petition in GP84-55-000 or in Consolidated's motion for consolidation would support a finding that Southern Union's sale to El Paso is non-jurisdictional. The fact that El Paso's purchases from Southern Union are declining does not alter the jurisdictional finding. Issues concerning the Commission's price and certificate jurisdiction over sales by Southern Union to parties other than El Paso are raised by Southern Union's petition in GP84-55-000. Issues are also raised concerning the extent to which gas available to Southern Union is "dedicated" to El Paso. However, there is no issue raised concerning the fact that Southern Union's sales to El Paso are sales

for resale in interstate commerce. This is true irrespective of possible future findings concerning the jurisdictionality of Southern Union's other sales or about the nature and extent of Southern Union's dedication of gas to El Paso. The issues raised by Southern Union's petition in GP84-55-000 are not common to the specific and very limited issues decided in the August 20 order. We have previously considered and rejected Consolidated's arguments that a hearing in this case is required. Consolidated's arguments in its motion of December 21, 1984 do not provide any basis for consolidation or hearing with regard to the proceeding in Docket CI80-264-001.

In its answer of January 31, 1985, Consolidated introduces a new argument in support of its motion for consolidation and hearing. Consolidated argues that while the original 1953 contract between Southern Union and El Paso specifies that the gas to be provided to El Paso will be taken from the Pictured Cliffs and Mesaverde formations in San Juan and Rio Arriba Counties, New Mexico, the bulk of the gas produced by Consolidated under the subject contracts is from the Dakota formation. (Some of Consolidated's production is from the Mesaverde formation). The intended conclusion, apparently, is that Consolidated's Dakota production is not dedicated to interstate commerce under the contracts.

Consolidated's argument is without merit. The Southern Union-El Paso contract was amended by means of a supplement dated May 24, 1963, which deleted the relevant provisions of the 1953 contract (Article V, Section 1) and substituted a new provision specifying that the gas provided by Southern Union to El Paso would be withdrawn from the Pictured Cliffs, Mesaverde *and* Dakota formations.

The Commission orders:

Consolidated's request for rehearing of the August 20 order and its motion for consolidation and hearing are denied.

APPENDIX E

[¶ 61,359]

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. GP86-2-000

SOUTHERN UNION COMPANY

DECLARATORY ORDER

(Issued June 19, 1986)

Before Commissioners: Anthony G. Sousa, Acting Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On October 16, 1985, Southern Union Company (Southern Union) filed a petition with the Federal Energy Regulatory Commission (Commission), pursuant to sections 4 and 16 of the Natural Gas Act (NGA),[1] sections 103 and 104 of the Natural Gas Policy Act of 1978 (NGPA),[2] and Rule 207 of the Commission's Rules of Practice and Procedure.[3] Southern Union seeks a declaratory order from the Commission that a tort damage award by the District Court of Santa Fe County, State of New Mexico in *Consolidated Oil and Gas Co. v.*

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[1] 15 U.S.C. §§ 717c and 717o (1982).

[2] 15 U.S.C. §§ 3313-3314 (1982).

[3] 18 C.F.R. § 385.207 (1985).

Southern Union Co.[4] cannot lawfully be collected because the damages represent an unlawful increase over the NGPA ceiling prices. Southern Union also seeks a refund of that portion of a lump sum payment which it asserts is attributable to rates exceeding applicable NGPA ceiling prices made in connection with a 1976 Settlement Agreement. For the reasons set forth below, the Commission finds that the court-awarded damages are tort damages and do not constitute unlawful adjustments in the rates collected under gas purchase contracts. The Commission finds further that Southern Union has failed to supply adequate information warranting a refund of any portion of the lump sum payment made in the 1976 Settlement Agreement.

Background

Southern Union purchases gas from Consolidated Oil and Gas Co., Inc. (Consolidated), a small producer in the San Juan Basin area of New Mexico, as well as from a number of other producers located in the same area. The commingled gas stream is sold by Southern Union in both intrastate and interstate commerce. In September 1974, Consolidated and a number of other producers filed suit in the New Mexico state district court for breach of contract against Southern Union, alleging that certain favored nations pricing provisions in intrastate gas contracts had been activated, entitling these producers to higher gas prices. While the New Mexico state district court's decision on the merits was on appeal, the parties entered into a settlement agreement which provided for higher prices under the disputed contracts and included a lump sum payment relative to past sales made under these contracts (1976 Settlement Agreement).

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[4] No. SF79-2161(c) (N.M. Dist. Ct. July 12, 1985), *appeal docketed*, No. 79-2161(c) (N.M. Sup. Ct. August 9, 1985).

In 1979, Consolidated filed suit against Southern Union in the New Mexico state district court alleging breach of the 1976 Settlement Agreement and arguing that Southern Union had failed to pay the full price for gas established in the 1976 Settlement Agreement. This complaint was later amended to include actions for fraud and deceit. Southern Union denied liability and, on March 25, 1980, petitioned the Commission to issue a declaratory order that the Commission had primary jurisdiction over the case, that Consolidated's sales of gas at issue were not sales in intrastate commerce but sales in interstate commerce for resale subject to Commission rate regulation, and that Consolidated could not lawfully collect rates in excess of those allowed under Commission rate regulation. Southern Union argued in its petition to the Commission that at the time of the 1976 Settlement Agreement, there was a mutual mistake by the parties that all the gas was to be sold in intrastate commerce, and therefore, was not subject to the Commission's jurisdiction. Southern Union argued that, in fact, gas under four of these contracts was sold in interstate commerce and was therefore subject to Commission jurisdiction and rate regulation. According to Southern Union, these four contracts had been mistakenly included in the 1976 Settlement Agreement. Southern Union's refusal to honor the settlement prices for gas purchased under these four contracts was based on its assertion that these prices are higher than the applicable NGPA ceiling prices. In its 1980 petition to the Commission, Southern Union also sought a refund of that portion of the lump sum payment paid to Consolidated under the 1976 Settlement Agreement which it alleges is in excess of the Commission's maximum lawful rates.

At the time of its 1980 petition to the Commission, Southern Union also filed a motion for stay in the New Mexico state district court pending Commission action on its petition. The New Mexico state district court de-

nied Southern Union's motion for stay, but referred two issues to the Commission for examination and determination on the basis of primary jurisdiction. The New Mexico state district court requested the Commission to determine whether any of the gas under the four disputed contracts was, in fact, subject to Commission jurisdiction, and, if so, what rates could be paid by Southern Union to Consolidated, absent controlling principles of state law for fraudulent and deceitful conduct.

The Commission's order, issued August 20, 1984, declared that because Southern Union had commingled the gas with other gas and sold a portion of the commingled stream for resale in interstate commerce, all natural gas sold by Consolidated under the four disputed contracts was subject to Commission jurisdiction under the NGA.[5] Noting that Consolidated's sales under the disputed contracts were covered by a small producer blanket certificate of public convenience and necessity issued in 1972, the Commission declared that the lawful rate for these sales is the contract rate or the applicable NGPA ceiling rate, whichever is lower. While the Commission did not have adequate information to calculate Consolidated's contract rates, the Commission did provide the New Mexico state district court with the applicable NGPA ceiling rates on small producer sales in the related area for the time period involved under the disputed contracts. The Commission denied Southern Union's request to exercise primary jurisdiction over the contractual aspects of the case. However, the Commission did declare that if the New Mexico state district court were to award damages for breach of contract on the basis of a rate in excess of that permitted under Consolidated's certificate, Consolidated would be required to seek specific Commission authorization before collecting the rate. The Commission also noted that if the New Mexico state dis-

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[5] 28 FERC ¶ 61,225, at p. 61,425.

trict court found fraud on the part of Southern Union and awarded damages which would have the effect of increasing Consolidated's rate above the applicable ceiling rate or above Consolidated's contractually authorized rate, whichever is lower, it might become necessary for the Commission to decide whether to exercise jurisdiction. Pointing out that the New Mexico state district court had not reached a decision on the merits, the Commission concluded that either the New Mexico state district court could refer this issue to the Commission or the parties could petition the Commission at the conclusion of the case.

On March 22, 1985, in an order denying rehearing and motion for consolidation and hearing submitted by Consolidated, the Commission again addressed the possibility of Commission action in the event the New Mexico state district court awarded damages based on fraud.[6] Declining to modify its August 20, 1984 order, the Commission emphasized that it did not intend either to waive its jurisdiction over Consolidated's sales or rates, or to intrude on the jurisdiction of the New Mexico state district court. The Commission declared that any Commission decision on the issue of whether an award of damages would be construed as exceeding applicable NGPA ceiling prices would await an actual damage award. Leaving this matter for another day, the Commission noted that any decision would depend on a number of factors including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles.[7]

On July 12, 1985, the New Mexico state district court, exercising its jurisdiction with respect to the construction

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[6] 30 FERC ¶ 61,350, at p. 61,710.

[7] Consolidated has petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Commission's August 1984 and March 1985 orders. *Consolidated Oil and Gas Co. v. F.E.R.C., appeal docketed,* No. 85-1191 (D.C. Cir., June 17, 1985).

of the parties' 1976 Settlement Agreement and the common law tort claim, found that Southern Union had made negligent misrepresentations which Consolidated had relied upon to its detriment. The court awarded Consolidated $11,023,967 in damages and pre-judgment interest.[8]

Southern Union's Petition

Southern Union's October 1985 petition requests the Commission to determine whether these damages represent an increase over the ceiling rates applicable to gas sold under the disputed contracts which Consolidated cannot lawfully collect. Southern Union also requests the Commission to order a refund of that portion of the lump sum payment in the 1976 Settlement Agreement attributable to rates in excess of applicable NGPA ceiling prices.

In its 1985 petition Southern Union points out that the trial judge, using a benefit-of-the-bargain standard, based the damage award on a damage study prepared by Consolidated. Southern Union notes that Consolidated arrived at the figures shown in the damage study by subtracting the interstate ceiling prices applicable to gas sold under the disputed contracts from the higher intrastate prices specified in the 1976 Settlement Agreement. According to Southern Union, the court's damage award would therefore allow Consolidated to collect amounts in excess of the previously determined interstate ceiling prices for jurisdictional gas sold in interstate commerce.

According to Southern Union, the applicable legal principles flow from *Arkansas Louisiana Gas Co. v. Hall*, a 1981 Supreme Court case which overturned a damage

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[8] Southern Union has appealed the New Mexico state district court's decision to the New Mexico Supreme Court, *Consolidated Oil and Gas Co. v. Southern Union Co., appeal docketed* No. 79-2161(c) (N.M. Sup. Ct., August 9, 1985).

award in a breach of contract action filed in a Louisiana state court.[9] The Supreme Court declared that the filed rate doctrine, which forbids a regulated entity from charging rates for its service other than those properly filed with the regulatory agency, prohibits the award of damages for breach of contract where such an award would make the price paid for the gas exceed the rate on file. According to Southern Union, the Commission recognized this precedent in its August 1984 order declaring that while the filed rate doctrine technically does not apply to rates permitted under small producer certificates, Consolidated is foreclosed from collecting a rate higher than the applicable ceiling price absent specific authority from the Commission.[10] Pointing out that Consolidated did not proceed to trial seeking damages for breach of contract, Southern Union argues that in rejecting Consolidated's fraud theory, the New Mexico state district court's decision removes this case from the one exception recognized by the Supreme Court in the *Hall* case, damages awarded for fraud or other affirmative misconduct.

In its petition, Southern Union attempts to distinguish the instant case from *Gulftide Gas Corporation*,[11] a 1985 order in which the Commission declared that collection of certain punitive and actual damages awarded to a gas producer did not violate the maximum lawful price provisions of the NGPA. Southern Union notes that the damage award in *Gulftide* was for fraudulent misrepresentation and was not based on the price paid for gas. Southern Union also notes that the gas involved in *Gulftide* was NGPA section 105 gas which derives ceiling prices based on contract prices. According to Southern Union, the Commission in *Gulftide* concluded for these

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[9] 453 U.S. 571 (1981).

[10] 28 FERC ¶ 61,255, at p. 61,427.

[11] 31 FERC ¶ 61,228 (1985).

reasons that the actual damages reflect the parties' contract price, not exceeding the NGPA ceiling price and that, therefore, the damage award did not amount to an impermissible collection of a price in excess of that permitted for the first sale of gas under the NGPA. In its petition, Southern Union points out that the New Mexico state district court rejected Consolidated's fraudulent misrepresentation claim and awarded no punitive damages. Southern Union also argues that the intrastate prices which were the basis for the damage award in this case exceed the interstate ceiling prices which the Commission has determined are applicable to the disputed contracts.

According to Southern Union, the New Mexico state district court's award of damages invades the Commission's exclusive jurisdiction to establish rates to be charged by Consolidated for the sale of natural gas for resale in interstate commerce. Southern Union argues that the damage award is tantamount to payment of an intrastate price for jurisdictional gas sold in interstate commerce conflicting with Congress' and the Commission's power to set and regulate interstate gas sales and rates.

Finally, Southern Union requests the Commission to declare that the portion of the 1971 Settlement Agreement lump sum payment which it asserts represents an improper rate increase should be refunded. According to Southern Union, this portion totals $194,421.63, subject to audit.

The petition was noticed in the *Federal Register* on November 25, 1985.[12] Consolidated intervened and filed an answer to Southern Union's petition for a declaratory order.

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[12] 50 Fed. Reg. 48,471.

Consolidated's Answer

Consolidated's answer raises six arguments in opposition to Southern Union's petition for a declaratory order. Consolidated's initial argument is that Southern Union's petition is premature and infringes on appellate court proceedings. Consolidated argues that not only does Southern Union's petition violate the terms of the Commission's prior order, but also that any Commission action at this time would violate the review provisions of the NGA. According to Consolidated, Commission action on Southern Union's request at this time will result in administrative waste and inefficiency.

Consolidated's second argument requests the Commission to follow its own precedents and defer to the New Mexico state district court in this proceeding. Consolidated contends that the Commission should apply its policy of avoiding interference in pending litigation. Consolidated particularly points to the Commission's well-established policy of deferring to the courts concerning contract interpretation questions.

Third, Consolidated argues that the Commission lacks jurisdiction to consider Southern Union's petition. According to Consolidated, the Commission does not have independent statutory authority to review state settlement agreements. Consolidated argues that the State of New Mexico has exclusive authority to determine damages for tortious misconduct.

Declaring that *Arkansas Louisiana Gas Co. v. Hall* does not apply to common law tort damages, Consolidated's fourth argument emphasizes that state common law tort damage awards for negligent misrepresentation are not subject to Commission review. Consolidated points out that the New Mexico state district court's judgment is based on tortious misconduct relating only to the 1976 Settlement Agreement and, therefore, the tort damage award is beyond the Commission's review authority.

Fifth, Consolidated argues that the Commission cannot order Consolidated to refund any lump payments made to Consolidated at the time of the 1976 Settlement Agreement, pointing out that the New Mexico court found that Southern Union had not proved its counterclaim for the lump sum refund. Consolidated notes that the Commission denied Southern Union's request for a refund in its August 1984 order because Southern Union had failed to supply adequate information showing that there were excess payments.[13] According to Consolidated, Southern Union has not provided adequate information in this petition to warrant Commission consideration of this request.

Consolidated's final argument declares that Southern Union's petition violates principles of estoppel. According to Consolidated, Southern Union is attempting to retry issues which have already been fully litigated.

Consolidated concludes that, because of the premature nature of Southern Union's request, the Commission's policy of not intruding in ongoing court litigation, its lack of jurisdiction over common law tort matters, and the paucity of both legal and factual support for Southern Union's request, the Commission should deny or dismiss Southern Union's petition for a declaratory order.[14]

Commission Decision

The Commission finds that the damages awarded Consolidated by the New Mexico state district court do not violate the maximum lawful price provisions of the NGPA. The award of damages in this case does not amount to an impermissible regulation of the first sale of natural gas in violation of the NGPA.

In the March 1985 order, the Commission refused to speculate whether an award of damages based on breach

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[13] 28 FERC ¶ 61,225, at p. 61,424, n.17.

[14] Consolidated also filed a motion to dismiss or, in the alternative, to defer action on Southern Union's petition for a declaratory order.

of contract or other grounds would be construed as exceeding the applicable ceiling rate in the absence of an actual damage award. The July 12, 1985 decision of the trial court with its findings of fact and conclusions of law contains an actual damage award sufficient to permit the Commission to address this issue at this time. The Commission rejects Consolidated's arguments that a decision is premature until final resolution of both of the appellate proceedings related to this case. The decision in this order will have no bearing on either the issue of jurisdiction currently before the United States Court of Appeals for the District of Columbia Circuit or the appeal of the trial court's decision currently before the New Mexico Supreme Court.[15]

The Commission notes that the trial court's decision focused on the construction of the 1976 Settlement Agreement and common law tort claims. The trial court found that Southern Union owed a duty to Consolidated to provide truthful and accurate information concerning the resale destination of gas covered by disputed contracts, that Southern Union breached this duty and negligently made representations to Consolidated that were not true, that Consolidated relied to its detriment on these representations and entered into a settlement agreement dismissing its lawsuit against Southern Union and releasing its claims against Southern Union, and finally, that as a direct and proximate cause of Southern Union's conduct, Consolidated had been damaged in the amount of $8,427,978 plus pre-judgment interest in the amount of $2,595,919.[16] The decision and the damages awarded by New Mexico state district court sound in tort, not contract. The court did not attempt to determine whether

[15] Consolidated raised the same arguments in its motion to dismiss or to defer. For the reasons stated in the textual paragraph accompanying this footnote, Consolidated's motion is denied.

[16] *Consolidated Oil & Gas Co. v. Southern Union Co.*, No. SF79-2161(c), slip op. at 8-9 (First Judicial District, County of Santa Fe, State of New Mexico, July 12, 1985).

the contracts were interstate or intrastate, or whether, in fact, Consolidated was entitled to an interstate or intrastate rate. Rather, the court's decision focused on the conduct of the parties.

Recently, in *Gulftide Gas Corp.*,[17] a case also involving court-awarded damages based on tortious misrepresentations, the Commission determined that court-imposed tort damage awards do not represent rate payments in excess of prevailing Federal price ceilings. In *Gulftide*, the Commission declared that the award of tort damages, whether exemplary or actual, does not conflict with NGPA maximum lawful prices.[18] There is nothing presented in the facts in this case to warrant the Commission reaching a different conclusion. The Commission rejects Southern Union's arguments distinguishing *Gulftide* from the facts in this case. The category of the gas involved in *Gulftide* and this case is not dispositive of whether court-awarded damages arising in tort actions will conflict with the NGPA. It is the nature of the court action, not the category of the gas involved in the litigation, which determines whether the damages conflict with Title I of the NGPA. The Commission also rejects Southern Union's attempt to distinguish the court's finding of fraudulent misrepresentation in *Gulftide* with the court's finding of negligent misrepresentation in this case. The actions are both tortious in nature and relate to the conduct of the parties, rather than their performance of contractual obligations. The Commission finds that the tort damages in both cases are not part of the price paid for natural gas.

Further, the Commission rejects Southern Union's argument that the benefit-of-the-bargain measure of damages used in this case will permit Consolidated to collect

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[17] 31 FERC ¶ 61,288 (1985).

[18] *Id.* at p. 61,596.

prices in excess of the previously determined interstate ceiling prices for jurisdictional gas sold in interstate commerce. Damages by their very nature must be based on sums certain and they may not be speculative. The trial court is not precluded from determining that the damages were the amount equal to the difference between what Consolidated was paid by Southern Union under the Settlement Agreement and the amount Consolidated would have been paid had the representations of Southern Union been true.[19] The Commission finds that the New Mexico state district court's award of damages was not based on any assumption that Consolidated was necessarily entitled to an intrastate rate over the interstate rate. Rather, the court focused on the tortious conduct of Southern Union which resulted in Consolidated acting to its detriment. The fact that the court used the price differential between the interstate and intrastate rates to determine the damages does not negate the court's finding of tortious misconduct from which these damages arise.

Arkansas Louisiana Gas Co. v. Hall is not apposite in this case. The Supreme Court's decision, that a Federally regulated seller of natural gas is precluded from collecting an award of damages in a breach of contract action filed in a Louisiana state court, was based on the filed rate doctrine. The Commission is not addressing the filed rate doctrine in this case. Rather, the Commission is addressing the issue of whether damages awarded in an action based in tort violate the maximum lawful price provision of the NGPA.

Finally, the Commisison finds that Southern Union has not supplied adequate information showing that it made any excess payments. Therefore, the Commission denies

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[19] *Consolidated Oil and Gas Co. v. Southern Union Co.*, No. SF79-2161(c), slip op. at 8 (N.M. Dist. Ct., July 12, 1985).

Southern Union's request to require Consolidated to make refunds of rates paid in excess of the applicable ceiling rate under the 1976 Settlement Agreement.

The Commission orders:

(A) The tort damage award made by the District Court of Santa Fe County, State of New Mexico in *Consolidated Oil and Gas Co. v. Southern Union Co.* does not represent rates in excess of applicable NGPA ceiling prices.

(B) Southern Union's request for a refund of that portion of the lump sum payment made under the 1976 Settlement Agreement is denied.

(C) Consolidated's motion to dismiss, or, in the alternative, to defer action on Southern Union's petition for declaratory order is denied.

APPENDIX F

[¶ 61,212]

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. GP86-2-001

SOUTHERN UNION COMPANY

ORDER DENYING REHEARING

(Issued May 22, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On July 21, 1986, Southern Union Company (Southern Union) filed a request for rehearing of the order issued in this proceeding on June 19, 1986, 35 FERC ¶ 61,359 in which the Commission held that tort damages ordered by the District Court of Santa Fe County, State of New Mexico, to be paid by Southern Union to Consolidated Oil & Gas, Inc. (Consolidated) do not constitute an unlawful increase in applicable NGPA ceiling prices.[1] The Commission also found that Southern Union failed to supply adequate information to warrant requiring Consolidated to refund any portion of a lump sum payment made by Southern Union to Consolidated pur-

[1] *Consolidated Oil and Gas, Inc. v. Southern Union Co.*, No. SF79-2161(c) (N.M. Dist. Ct. July 12, 1985), *appeal docketed*, No. 79-2161(c) (N.M. Sup. Ct. Aug. 9, 1985).

suant to a 1976 settlement of a separate state court action.

In its request for rehearing, Southern Union asserts that the Commission's June 19 order erroneously relies on a distinction between tort and contract causes of actions in determining whether a state court damage award conflicts with federal authority. Southern Union characterizes the Commission's decision as a "snapshot" of the case and claims the Commission failed to make an examination of the case as a whole. Southern Union states that even though "artfully pleaded," a state claim cannot preempt federal jurisdiction where the substance of that claim is "inextricably intertwined" with a transaction subject to exclusive federal regulation.

Southern Union contends that the Commission improperly concluded that *Arkansas Louisiana Gas Company v. Hall*, 453 U.S. 571 (1981) (*Arkla*) dealing with the filed rate doctrine is inapplicable to the facts and issues presented in this case and represents an arbitrary departure from the Commission's earlier orders in this case which recognize that *Arkla* governs. Southern Union further claims that the state court action and resulting damage award encroaches on the Commission's exclusive domain, and that the order of June 19 represents an unlawful abdication of Commission responsibility under the NGA and NGPA. Southern Union asserts that by ignoring the nature and substance of Consolidated's state court claim, the Commission improperly ratified Consolidated's unlawful attempt to circumvent the requirements of the NGA and NGPA.

The Commission's June 19 decision is based primarily on *Gulftide Gas Corporation*, 31 FERC ¶ 61,288 (1985), in which the Commission declared that the award of exemplary or actual damages in a fraudulent misrepresentation case did not conflict with the NGPA's maximum lawful prices. The Commission found the facts of *Gulf-*

tide similar to those of this case and held that the damages awarded to Consolidated were not part of the price paid for natural gas purchased by Southern Union from Consolidated. In making that determination, the Commission reviewed Consolidated's state court damage award, including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles.

The arguments presented by Southern Union represent a restatement of arguments previously raised and rejected by the Commission in the order of June 19. Southern Union has presented no new facts or arguments which would warrant modifying that order and the request for rehearing should accordingly be denied.

The Commission orders:

Southern Union's request for rehearing is denied.

APPENDIX G

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. GP86-2-002

SOUTHERN UNION COMPANY

ORDER REAFFIRMING AND CLARIFYING PRIOR ORDERS

(Issued November 20, 1987)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

On June 19, 1986, the Commission issued a declaratory order in the above-referenced docket holding that a New Mexico state court decision requiring Southern Union Company (Southern Union) to pay to Consolidated Oil & Gas Inc. (Consolidated) $8,427,978 plus $2,595,989 in prejudgment interest as damages for negligent misrepresentation in a contract dispute did not violate federal natural gas price ceilings and could therefore be lawfully collected by Consolidated. 35 FERC ¶ 61,359. Rehearing was denied on May 22, 1987. 39 FERC ¶ 61,212.

The Commission's orders were appealed by Southern Union to the United States Court of Appeals for the District of Columbia Circuit. Because of reservations

concerning the legal sufficiency of the June 19 order and the correctness of its holding, the Commission on September 3, 1987, filed with the court a motion requesting deferral of the filing of the record pending Commission reconsideration of the case. On September 24, 1987, the court granted the Commission deferral of filing until November 23, 1987. However, since the record has not yet been filed, the Commission retains authority to act in the matter pursuant to section 19 of the Natural Gas Act. Based on further consideration of the New Mexico state court decision and particularly the 1976 settlement which gave rise to the state court proceedings, the Commission concludes that the June 19 order is correct. For the reasons set forth in the following discussion, the Commission holds that the state court judgment does not result in a violation of FPC ceiling prices and Congressionally mandated maximum lawful prices under the Natural Gas Policy Act of 1978 (NGPA).

The facts giving rise to Southern Union's request for a declaratory order are set forth in detail in the order of June 19 and will only be summarized here in pertinent detail. Southern Union purchases gas from Consolidated and other producers in the San Juan Basin area of New Mexico. The commingled gas stream is sold by Southern Union in both inter and intrastate commerce. The contracts under which the gas was sold contained favored-nations clauses which generally required Southern Union to pay Consolidated prices equal to the highest prices paid to any producer in the San Juan Basin. During the 1970's as the gas shortage emerged, the favored nation clauses triggered prices for intrastate sales in excess of the interstate ceiling prices established by this Commission. In 1974 Consolidated and other producers sued Southern Union for breach of contract, claiming higher prices resulting from activation of the favored nations clauses. This case was resolved through a 1976 settlement agreement which provided for payment of higher prices by

Southern Union. Erroneously included among the contracts subject to the settlement were four contracts under which Consolidated made jurisdictional (interstate) sales to Southern Union and for which it had previously been issued certificates of public convenience and necessity by the FPC.[1] These sales were thus subject to prevailing FPC regulated prices and later the applicable maximum lawful prices established under sections 103 and 104 of the NGPA. These prices were lower than the prices agreed to by Southern Union in the settlement.

Southern Union refused to honor the 1976 settlement with respect to the four jurisdictional contracts, and in 1979 Consolidated filed suit against Southern Union for breach of the settlement agreement. This complaint was later amended to include action for misrepresentation, fraud and deceit. This action culminated on July 12, 1985, in the $8,427,978 plus interest judgment which is the subject of the present dispute between the parties and of this order. The decision of the New Mexico District Court was based on a determination under tort law that Southern Union's inclusion of the four disputed contracts in the 1976 settlement constituted negligent misrepresentation to Consolidated that it was entitled to intrastate prices for sales made under those contracts and that Consolidated relied on the misrepresentation.[2] On October 16, 1985, Southern Union filed its petition for a declaratory order holding that the judgment constituted

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[1] The jurisdictional nature of these sales was confirmed by the Commission in an order issued August 20, 1984, in Docket No. CI80-264-000. 28 FERC ¶ 61,225; rehearing denied March 22, 1985, 30 FERC ¶ 61,350. These orders were affirmed in Consolidated Oil & Gas, Inc. v. FERC, 806 F.2d 275 (D.C. Cir. 1986).

[2] This decision was affirmed by the Supreme Court of New Mexico. On September 25, 1987, Consolidated filed copies of the decisions of the New Mexico District Court and Supreme Court and moved that they be lodged in the record of this proceeding. The motion is granted.

a violation of applicable federal ceiling prices and therefore could not lawfully be collected by Consolidated.

In its October 16, 1985, petition for a declaratory order, Southern Union relied primarily on the case of *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*Hall*). In *Hall*, the Supreme Court held that Hall, *et al.*, Louisiana producers, were precluded from recovering a breach of contract judgment entered by a Louisiana state court. That judgment was based on the Louisiana Court's determination that the *Hall* producers were entitled to a higher price for their gas than they had received from the purchaser, Arkansas Louisiana Gas Company, by virtue of the operation of the favored nations clause in the Hall contracts. The Supreme Court disallowed the judgment on the ground the state court judgment would result in a rate different from that on file with the Commission. The Court held that in granting the judgment, the state court had "usurped a function that Congress has assigned to a federal regulatory body. This the Supremacy Clause will not permit." 453 U.S. at 582.[3] The Court went on, however, to leave open the possibility of a different result in a case involving "affirmative misconduct," 453 U.S. at 583, stating that "we save for another day the question of whether the filed rate doctrine applies in the face of fraudulent conduct." Id. at n.12.

In its June 19 declaratory order, the Commission rejected Southern Union's reliance on *Hall*. It found *Hall* to be inapposite because it involved a breach of contract action and was based on the filed rate doctrine, whereas

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[3] Hall subsequently became entitled to the state court judgment when this Commission waived the notice requirements of section 4 of the NGA and thereby allowed Hall's revised rate to be effective retroactively based on the order of the D.C. Circuit in Frank Hall v. FERC, 691 F.2d 1184 (5th Cir. 1982). The approved rates did not exceed applicable for ceiling prices [sic]. The case was ultimately settled. 31 FERC ¶ 61,057 (1985).

the dispute between Southern Union and Consolidated involved the issue of whether state court damages awarded in an action in tort violate applicable federal price ceilings for natural gas. The Commission instead relied on its earlier decision in *Gulftide Gas Corp.*, 31 FPC ¶ 61,288 (1985), in which the Commission held that the award of exemplary tort damages did not conflict with NGPA maximum lawful prices. The actual damages in *Gulftide* did not exceed the ceiling price because under the well category involved there, the contract price *was* the ceiling price. The Commission rejected Southern Union's attempt to distinguish between the finding of fraudulent misrepresentation in *Gulftide* and the New Mexico court's finding of negligent misrepresentation. The Commission held that the actions "are both tortious in nature and relate to the conduct of the parties, rather than their performance of contractual obligations." 35 FERC at 61,822. The Commission concluded that tort damages are not part of the price paid for natural gas. Consequently, the Commission held that the fact that the damages awarded Consolidated were based on the difference between the interstate prices received by Consolidated and the higher intrastate prices provided for under the settlement did not result in Consolidated's realizing prices in excess of applicable interstate ceiling prices. The Commission reaffirmed these conclusions in denying rehearing.

Upon further consideration of this matter, the Commission concludes that the result of the June 19 declaratory order is correct, but its reasoning should be clarified. We reach this conclusion for several reasons. First, we have reviewed the *Gulftide* order and find that because the facts in *Gulftide* differ from those in this case, the general principle of *Gulftide*, that exemplary tort damages do not violate federal natural gas price ceilings, does not control this case. *Gulftide* involved an award of exemplary damages of over $1 million for fraudulent

misrepresentation and actual damages of approximately $62,800, (plus interest and attorney fees). It is reasonable to conclude that exemplary or punitive damages do not constitute payments for gas and therefore do not conflict with federal price ceilings. As pointed out in *Gulftide*, "exemplary damages are sums of money assessed in such amounts as are appropriate under the facts as punishment for wrongdoing and as an example for the good of the public." 31 FERC at 61,595 (quoting the trial judge). In this case, however, no exemplary damages are involved. While the New Mexico trial judge noted that there was some evidence of fraud, he declined to find Southern Union guilty of fraud. On review of the trial judge's findings, the Supreme Court of the State of New Mexico affirmed the lower court.

In resolving the central question of whether the damages awarded by the New Mexico court for negligent misrepresentation do or do not represent payments for gas sold by Consolidated to Southern Union under the four jurisdictional contracts, the Commission concludes that it is sufficient on the specific facts of this case to allow Consolidated to collect its state court judgment. The judgment award in this case was given to Consolidated because the state court found that Consolidated, by relying on Southern Union's negligent misrepresentation, gave up valuable consideration by not pursuing its court claim and suffered damages as a result. As the New Mexico Supreme Court pointed out, the events in question here do not involve a situation where Southern Union agreed to buy and Consolidated agreed to sell certain amounts of gas at certain prices. Had that been the case, the damages would be for the price of gas, and impermissible. Here, instead, the damages represent what was suffered by Consolidated as a result of a misrepresentation in the context of a settlement of a claim under state jurisdiction which is clearly a matter of state concern. Therefore, the state court awarded monetary damages to compensate Consolidated for the harm it suffered.

Thus, the facts surrounding this case demonstrate that Consolidated should be allowed to recover the state court judgment. The New Mexico Court heard witnesses and viewed evidence on the same issues that Southern Union now requests the Commission to address. In this limited case, the Commission refuses to second guess the findings by courts of competent jurisdiction. This is a case that has been fully litigated in the state court system and Southern Union was found liable for negligent misrepresentation. Upon reviewing the complete facts and circumstances surrounding this case, the Commission has had several opportunities to assert its jurisdiction over this issue and declined to do so each time.[4]

Moreover, damages for breach of contract are treated differently than those for torts. Gas contract damages represent costs paid for gas, and thus can be recovered in current rates through a pipelines' PGA. By contrast, tort damages do not represent costs paid for gas, and therefore cannot be recovered in current rates. Thus, in this case, these tort damages will be paid by Southern Union's shareholders. Accordingly the Commission finds that the state court judgment does not violate the NGA or the NGPA.

Southern Union claims that the Commission errs by drawing an artificial distinction between tort and contract action. Southern Union states that the Commission incorrectly perceives a different conduct in tort actions than in contract actions. The Commission agrees that whether an action is for tort or breach of contract is sometimes hard to determine. As the Fifth Circuit has

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[4] The Commission refused in its March 22, 1985 order, 30 FERC ¶ 61,350 (1985), to declare that damages awarded by the court would be construed as exceeding the applicable ceiling price. The Commission noted that it would consider a number of factors including the amount of damages, the basis for the damages, and the relevant facts and circumstances and applicable legal principles. *Id.* at page 61,710.

recently observed, "we are well aware that liability in contract and liability in tort are kindred spirits and blend together at their edges." United Gas Pipe Line Co. v. FERC, 5th Cir. No. 86-4424 (August 18, 1987). On the other hand, while both tort and contract actions involve conduct there is a distinction between the two types of conduct. In this case, it is not the conduct under the contracts that is at issue, but the conduct surrounding settlement negotiations that prompted Consolidated to dismiss litigation against Southern Union. In an action for breach of contract there would appear to be an irreconcilable conflict between the NGPA and the common-law remedy because the rate paid for the gas would be affected. Here no conflict exists because the damages were paid for tortious conduct and the damage award is thus not considered part of the purchase price. The Commission's decision here is based on and limited to the specific facts of this case. Whether tort damages in future cases may be a violation of the NGA or NGPA necessarily will involve an analysis of the specific facts presented to determine whether the damages are part of the price paid for natural gas.

The Supreme Court has stated that "compliance with the intent of Congress cannot be avoided by mere artful pleading." *Chicago and Northwestern Transportation Company v. Kalo Brick & Tile Co.*, 450 U.S. 311 at 324 (1981) (state tort claims preempted by exclusive federal jurisdiction even though plaintiff's allegations did not contain specific language which would invoke the Interstate Commerce Act). *See also Amalgamated Ass'n. of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.) *cert. denied* 439 U.S. 930 (1978). However, there is a sharp distinction between this litigation, involving negligent misrepresentation during the negotia-

tion of a settlement, and an action for breach of contract. Furthermore, as stated above, both the Commission and the New Mexico courts reviewed the facts and circumstances surrounding this case and concluded that the tort action was not so "inextricably intertwined" with the pricing provisions of the NGPA that a finding of preemption was required.

We believe our decision here is distinguished from the underlying principles of *Arkla*, which we interpret as holding that in the absence of affirmative or fraudulent misconduct, breach of contract judgments which would increase the price of jurisdictional natural gas above the rates on file or the applicable maximum lawful price under the NGPA are preempted by the Congressionally mandated federal system of regulation of natural gas prices. In the present case, the judgment was awarded for negligent misconduct. Moreover, as we held above, under the specific facts presented here, the damages awarded do not constitute part of the price of gas. Since *Arkla* concerns a situation in which the damages were essentially "a rate never filed with the Commission . . . ." (450 US at 579), it is not applicable here.

Southern Union concluded its petition by stating that it had "already paid as part of a lump sum settlement payment an amount which represents the difference between the proper ceiling rates originally paid and intrastate rates mistakenly attributed to [the] four interstate contracts." (Petition at 17). Southern Union requests the Commission to order Consolidated to refund this payment, which is alleged to be $194,421.63, "subject to audit." In the June 19 order, the Commission found that Southern Union had not supplied adequate information to support its request and the request was denied. Upon further review of this matter, the Commission reaffirms its prior determination.

Based on the foregoing considerations, the Commission holds that the judgment of the New Mexico District

Court is not preempted by exclusive federal price regulation of the four disputed contracts and that the amounts awarded can lawfully be collected by Consolidated.

The Commission orders:

(A) The orders issued herein on June 19, 1986, and May 22, 1987, are reaffirmed and clarified in accordance with the terms of this order.

(B) Southern Union's request that Consolidated be required to refund a settlement payment of approximately $194,421 is denied.

By the Commission.

(SEAL)

/s/ Lois D. Cashell
LOIS D. CASHELL
Acting Secretary

APPENDIX H

SUPREME COURT OF THE UNITED STATES

No. A-304

SOUTHERN UNION COMPANY,
Applicant,

v.

CONSOLIDATED OIL & GAS, INC., *et al.*

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 12, 1987.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 16th day of October, 1987.

APPENDIX I

**Excerpts from the Natural Gas Act,
15 U.S.C. § 717, 717a, c, d, f, i & t**

Section 1, 15 U.S.C. § 717:

REGULATION OF NATURAL GAS COMPANIES

(a) NECESSITY OF REGULATION IN PUBLIC INTEREST.—As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) TRANSACTIONS TO WHICH PROVISIONS OF CHAPTER APPLICABLE.—The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) INTRA-STATE TRANSACTIONS EXEMPT FROM PROVISIONS OF CHAPTER; CERTIFICATION FROM STATE COMMISSION AS CONCLUSIVE EVIDENCE.—The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from an-

other person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

Section 2, 15 U.S.C. § 717a:

DEFINITIONS

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

(2) "Corporation" includes any corporation, joint stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural and artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

Section 4, 15 U.S.C. § 717c:

RATES AND CHARGES

(a) JUST AND REASONABLE RATES AND CHARGES.—All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) UNDUE PREFERENCES AND UNREASONABLE RATES AND CHARGES PROHIBITED.—No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable

difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) FILING OF RATES AND CHARGES WITH COMMISSION; PUBLIC INSPECTION OF SCHEDULES.—Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) CHANGES IN RATES AND CHARGES; NOTICE TO COMMISSION.—Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) AUTHORITY OF COMMISSION TO HOLD HEARINGS CONCERNING NEW SCHEDULE OF RATES.—Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality,

State commission, or gas distributing company or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rule or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions

pending before it and decide the same as speedily as possible.

Section 5, 15 U.S.C. § 717d:

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

(a) DECREASES IN RATES.—Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) COSTS OF PRODUCTION AND TRANSPORTATION.—The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to

establish a rate governing the transportation or sale of such natural gas.

Section 7, 15 U.S.C. § 717f:

CONSTRUCTION, EXTENSION~~, OR~~
ABANDONMENT OF FACILITIES

* * * *

(b) ABANDONMENT OF FACILITIES OR SERVICES; APPROVAL OF COMMISSION.—No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.—

(1) (A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time,

the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.—Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such informa-

tion, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) GRANTING OF CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY.—Except in the cases governed by the provisos contained in subsection (c) (1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) DETERMINATION OF SERVICE AREA.—The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization.

(g) CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR SERVICE OF AREA ALREADY BEING SERVED.—Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant

certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) RIGHT OF EMINENT DOMAIN FOR CONSTRUCTION OF PIPELINES, ETC.—When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessity right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

Section 10, 15 U.S.C. § 717i:

PERIODIC AND SPECIAL REPORTS

(a) FORM AND CONTENTS OF REPORTS.—Every natural-gas company shall file with the Commission such annual and other periodic or special reports as the Commission may by rules and regulations or order prescribe as necessary or appropriate to assist the Commission in the proper administration of this chapter. The Commission may prescribe the manner and form in which such reports shall be made, and require from such natural-gas companies specific answers to all questions upon which the Commission may need information. The Commission

may require that such reports shall include, among other things, full information as to assets and liabilities, capitalization, investment and reduction thereof, gross receipts, interest due and paid, depreciation, amortization, and other reserves, cost of facilities, cost of maintenance and operation of facilities for the production, transportation, or sale of natural gas, cost of renewal and replacement of such facilities, transportation, delivery, use, and sale of natural gas. The Commission may require any such natural-gas company to make adequate provision for currently determining such costs and other facts. Such reports shall be made under oath unless the Commission otherwise specifies.

(b) UNLAWFUL CONDUCT.—It shall be unlawful for any natural-gas company willfully to hinder, delay, or obstruct the making, filing, or keeping of any information, document, report, memorandum, record, or account required to be made, filed, or kept under this chapter or any rule, regulation, or order thereunder.

Section 21, 15 U.S.C. § 717t:

GENERAL PENALTIES

(a) Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or who willfully and knowingly omits or fails to do any act, matter, or thing in this chapter required to be done, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

(b) Any person who willfully and knowingly violates any rule, regulation, restriction, condition, or order made or imposed by the Commission under authority of this chapter, shall, in addition to any other penalties provided by law, be punished upon conviction thereof by a fine of not exceeding $500 for each and every day during which such offense occurs.

APPENDIX J

Excerpts From the Natural Gas Policy Act, 15 U.S.C. §§ 3313-14, 3414 & 3432

Section 103, 15 U.S.C. § 3313:

CEILING PRICE FOR NEW, ONSHORE PRODUCTION WELLS

(a) APPLICATION.—In the case of natural gas determined in accordance with section 3413 of this title to be produced from any new, onshore production well, the maximum lawful price computed under subsection (b) of this section shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be—

(A) $1.75 per million Btu's, in the case of April 1977; and

(B) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this paragraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month.

(2) PRODUCTION AFTER 1984 FROM WELLS 5,000 FEET OR LESS IN DEPTH.—Effective beginning with the month of January 1985 and in any month thereafter, in the case of any first sale of natural gas which was not committed or dedicated to interstate commerce on April 20, 1977, and which is produced from a new, onshore production well from a completion location located at a depth of 5,000 feet or less, the maximum lawful price under this section for any

such natural gas delivered during any month shall be a price which is midway between—

(A) the maximum lawful price, per million Btu's, computed for such month under section 3312 of this title (relating to new natural gas); and

(B) the maximum lawful price, per million Btu's, computed for such month under paragraph (1).

(c) DEFINITION OF NEW, ONSHORE PRODUCTION WELL.—For purposes of this section, the term "new, onshore production well" means any new well (other than a well located on the Outer Continental Shelf)—

(1) the surface drilling of which began on or after February 19, 1977;

(2) which satisfies applicable Federal or State well-spacing requirements, if any; and

(3) which is not within a proration unit—

(A) which was in existence at the time the surface drilling of such well began;

(B) which was applicable to the reservoir from which such natural gas is produced; and

(C) which applied to a well (i) which produced natural gas in commercial quantities or (ii) the surface drilling of which was begun before February 19, 1977, and which was thereafter capable of producing natural gas in commercial quantities.

(d) EXCLUSION OF CERTAIN ALASKA NATURAL GAS.—The preceding provisions of this section shall not apply to any natural gas produced from the Prudhoe Bay Unit of Alaska and transported through the natural gas transportation system approved under the Alaska Natural Gas Transportation Act of 1976 [15 U.S.C. 719 et seq.].

Section 104, 15 U.S.C. § 3314:

CEILING PRICE FOR SALES OF NATURAL GAS DEDICATED TO INTERSTATE COMMERCE

(a) APPLICATION.—In the case of natural gas committed or dedicated to interstate commerce on November 8, 1978, and for which a just and reasonable rate under the Natural Gas Act [15 U.S.C. 717 et seq.] was in effect on such date for the first sale of such natural gas, the maximum lawful price computed under subsection (b) of this section shall apply to any first sale of such natural gas delivered during any month.

(b) MAXIMUM LAWFUL PRICE.—

(1) GENERAL RULE.—The maximum lawful price under this section for any month shall be the higher of—

(A) (i) the just and reasonable rate, per million Btu's, established by the Commission which was (or would have been) applicable to the first sale of such natural gas on April 20, 1977, in the case of April 1977; and

(ii) in the case of any month thereafter, the maximum lawful price, per million Btu's, prescribed under this subparagraph for the preceding month multiplied by the monthly equivalent of the annual inflation adjustment factor applicable for such month, or

(B) any just and reasonable rate which was established by the Commission after April 27, 1977, and before November 9, 1978, and which is applicable to such natural gas.

(2) CEILING PRICES MAY BE INCREASED IF JUST AND REASONABLE.—The Commission may, by rule or order, prescribe a maximum lawful ceiling price, applicable to any first sale of any natural gas (or category thereof, as determined by the Commission)

otherwise subject to the preceding provisions of this section, if such price is—

(A) higher than the maximum lawful price which would otherwise be applicable under such provisions; and

(B) just and reasonable within the meaning of the Natural Gas Act [15 U.S.C. 717 et seq.].

Section 504, 15 U.S.C. § 3414:

ENFORCEMENT

(a) GENERAL RULE.—It shall be unlawful for any person—

(1) to sell natural gas at a first sale price in excess of any applicable maximum lawful price under this chapter; or

(2) to otherwise violate any provision of this chapter or any rule or order under this chapter.

(b) CIVIL ENFORCEMENT.—

(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), whenever it appears to the Commission that any person is engaged or about to engage in any act or practice which constitutes or will constitute a violation of any provision of this chapter, or of any rule or order thereunder, the Commission may bring an action in the District Court of the United States for the District of Columbia or any other appropriate district court of the United States to enjoin such act or practice and to enforce compliance with this chapter, or any rule or order thereunder.

* * * *

(4) RELIEF AVAILABLE.—In any action under paragraph (1), (2), or (3), the court shall, upon a

proper showing, issue a temporary restraining order or preliminary or permanent injunction without bond. In any such action, the court may also issue a mandatory injunction commanding any person to comply with any applicable provision of law, rule, or order, or ordering such other legal or equitable relief as the court determines appropriate, including refund or restitution.

(5) CRIMINAL REFERRAL.—The Commission may transmit such evidence as may be available concerning any acts or practices constituting any possible violations of the Federal antitrust laws to the Attorney General who may institute appropriate criminal proceedings.

(6) CIVIL PENALTIES.—

(A) IN GENERAL.—Any person who knowingly violates any provision of this chapter, or any provision of any rule or order under this chapter, shall be subject to—

(i) except as provided in clause (ii) a civil penalty, which the Commission may assess, of not more than $5,000 for any one violation; and

(ii) a civil penalty, which the President may assess, of not more than $25,000, in the case of any violation of an order under section 3362 of this title or an order or supplemental order under section 3363 of this title.

(B) DEFINITION OF KNOWING.—For purposes of subparagraph (A), the term "knowing" means the having of—

(i) actual knowledge; or

(ii) the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

(C) EACH DAY SEPARATE VIOLATION.—For purposes of this paragraph, in the case of a continuing violation, each day of violation shall constitute a separate violation.

(D) STATUTE OF LIMITATIONS.—No person shall be subject to any civil penalty under this paragraph with respect to any violation occurring more than 3 years before the date on which such person is provided notice of the proposed penalty under subparagraph (E). The preceding sentence shall not apply in any case in which an untrue statement of material fact was made to the Commission or a State or Federal agency by, or acquiesced to by, the violator with respect to the acts or omissions constituting such violation, or if there was omitted a material fact necessary in order to make any statement made by, or acquiesced to by, the violator with respect to such acts or omissions not misleading in light of circumstances under such statement was made.

(E) ASSESSED BY COMMISSION.—Before assessing any civil penalty under this paragraph, the Commission shall provide to such person notice of the proposed penalty. Following receipt of notice of the proposed penalty by such person, the Commission shall, by order, asssess [2] such penalty.

(F) JUDICIAL REVIEW.—If the civil penalty has not been paid within 60 calendar days after the assessment order has been made under subparagraph (E), the Commission shall institute an action in the appropriate district court of the United States for an order affirming the assessment of the civil penalty. The court shall

[2] So in original. Probably should be "assess."

have authority to review de novo the law and the facts involved, and shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part, such assessment.

(c) CRIMINAL PENALTIES.—

(1) VIOLATIONS OF CHAPTER.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any provision of this chapter shall be subject to—

(A) a fine of not more than $5,000; or

(B) imprisonment for not more than two years; or

(C) both such fine and such imprisonment.

(2) VIOLATION OF RULES OR ORDERS GENERALLY.—Except in the case of violations covered under paragraph (3), any person who knowingly and willfully violates any rule or order under this chapter (other than an order of the Commission assessing a civil penalty under subsection (b)(4)(E) of this section), shall be subject to a fine of not more than $500 for each violation.

(3) VIOLATIONS OF EMERGENCY ORDERS.—Any person who knowingly and willfully violates an order under section 3362 of this title or an order or supplemental order under section 3363 of this title shall be fined not more than $50,000 for each violation.

(4) EACH DAY SEPARATE VIOLATION.—For purposes of this subsection, each day of violation shall constitute a separate violation.

(5) DEFINITION OF KNOWINGLY.—For purposes of this subsection, the term "knowingly", when used with respect to any act or omission by any person, means such person—

(A) had actual knowledge; or

(B) had constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances.

Section 602, 15 U.S.C. § 3432:

EFFECT ON STATE LAWS

(a) AUTHORITY TO PRESCRIBE LOWER MAXIMUM LAWFUL PRICES.—Nothing in this chapter shall affect the authority of any State to establish or enforce any maximum lawful price for the first sale of natural gas produced in such State which does not exceed the applicable maximum lawful price, if any, under subchapter I of this chapter.

* * * *

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No. 87-962

(3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHERN UNION COMPANY,
Petitioner,

v.

CONSOLIDATED OIL & GAS, INC.,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of New Mexico

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BRIEF OF RESPONDENT IN OPPOSITION

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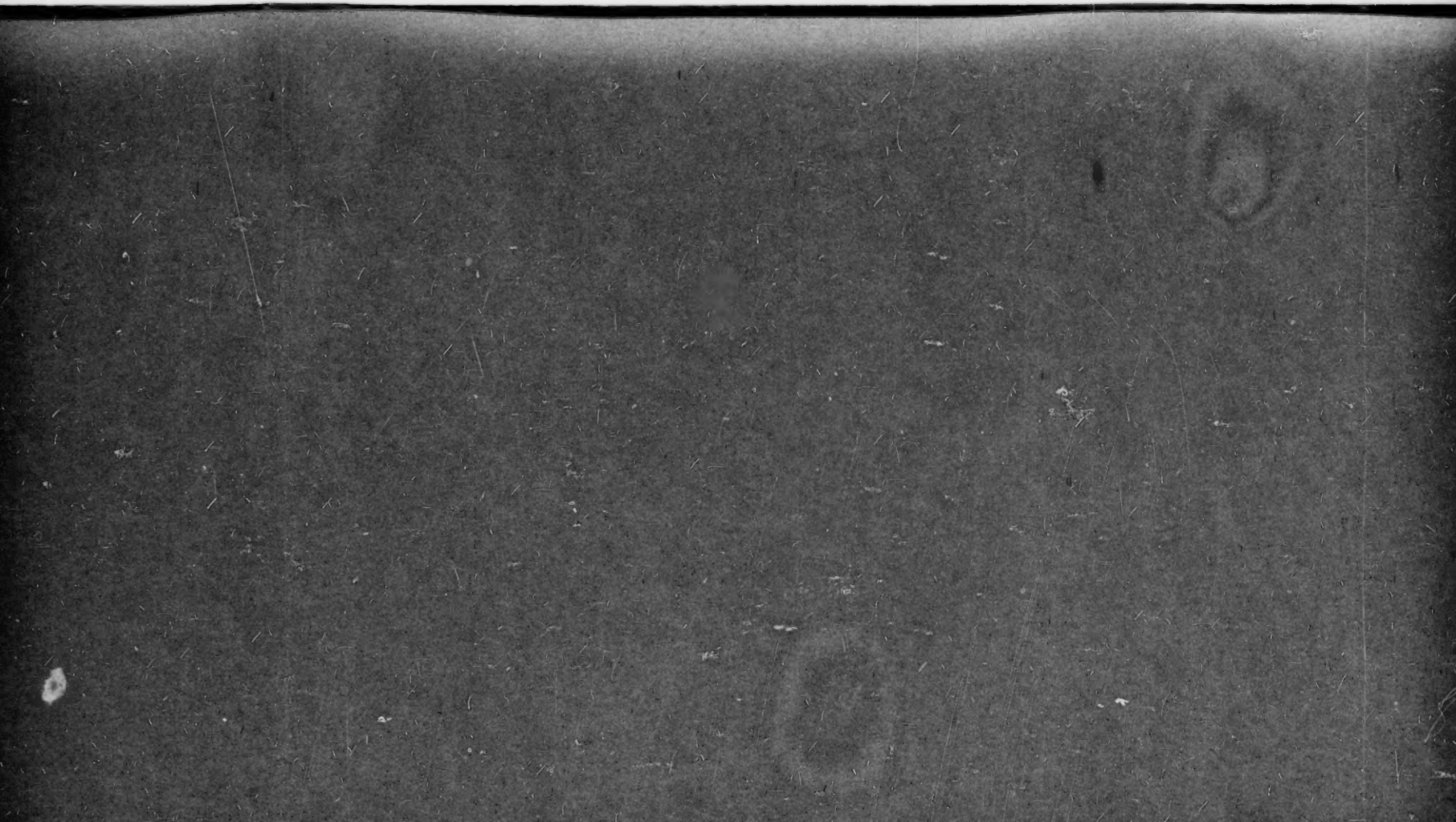

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---

BRIEF OF RESPONDENT IN OPPOSITION

Respondent Consolidated Oil & Gas, Inc. ("Consolidated") submits this brief in opposition to the petition for a writ of certiorari filed by the Southern Union Company ("Southern Union"), which seeks review of a state-law damage award based on negligent misrepresentations of fact made in connection with the settlement of a previous state lawsuit.[1] The basic issue presented is whether this tort judgment is preempted by federal regulation of gas prices under the Natural Gas Act (NGA) and the Natural Gas Policy Act (NGPA).

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[1] Consolidated Oil & Gas, Inc. has partial interests in Columbus Energy Corp. and Consolidated Energy Partners. Columbus Energy Corp., in turn, wholly owns CEC Resources, Ltd. and Columbus Gas Services, Inc. Consolidated Energy Partners owns a partial interest in Consolidated Operating Partners.

The Supreme Court of New Mexico, in affirming the judgment, ruled that an award of damages for the tortious misconduct at issue here does not conflict with federal law or policies. In collateral proceedings, the Federal Energy Regulatory Commission (FERC) has also found, on three separate occasions, that the trial court's award was not preempted. In light of the unanimous agreement of the New Mexico courts and FERC on this issue, as well as the fact-specific nature of this case, Supreme Court review clearly is not warranted.

STATEMENT

In the 1950s and 1960s, respondent Consolidated, a small gas producer in the San Juan Basin of New Mexico, signed various long-term sales contracts with petitioner Southern Union. All of these contracts contained "most favored nations" clauses entitling Consolidated to be paid the highest price paid to any producer in the Basin. Respondent's Appendix (Resp. App.) 4a.[2] In 1959 and 1963, Southern Union's attorneys obtained for Consolidated "Certificates of Public Necessity and Convenience" from the Federal Power Commission covering four of the contracts. Resp. App. 2a-3a.

During the relevant time period, Southern Union operated two parallel underground pipelines from the San Juan Basin. One transported gas solely for resale within the state, while the other transported gas in interstate commerce, for sale both within and outside the state. Southern Union possessed the ability to switch, easily and unilaterally, the gas from a particular producer's well into one pipeline or the other without the producer's knowledge.[3] The choice between pipelines was of little

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[2] Although required to do so by Rule 21(k)(ii) of the Rules of this Court, petitioner has not included in its appendix the findings of fact and conclusions of law entered by the state district court after trial. This ruling appears as Appendix A to this brief.

[3] Resp. App. 3a. The certificates allowed, but did not require, the shipment of the gas produced in interstate commerce subject

consequence to suppliers in the 1960s, when interstate and intrastate gas prices did not differ. It became important by the mid-1970s, however, when intrastate prices rose above federally imposed interstate price ceilings.

By 1974, Consolidated believed that Southern Union was in breach of the pricing provisions in the contracts. In September of that year, it filed suit in New Mexico District Court to enforce six specified contracts. The complaint did not mention various other Southern Union contracts based on a concern they might involve gas flowing in interstate commerce, and thus might be subject to federal price controls.

Southern Union won a motion for summary judgment in the case but, during the pendency of the appeal, initiated negotiations with Consolidated that culminated in a settlement on June 28, 1976.[4] Under the settlement agreement that was ultimately executed by the parties, Consolidated released its claims under existing contracts in return for two types of relief. It was to receive a lump-sum payment, plus revised contractual arrangements providing for specified higher prices in the future. Resp. App. 6a.

The final settlement was not limited to the six contracts named in the complaint. Its broader scope resulted from the fact that, during the settlement negotiations, Consolidated specifically questioned Southern Union concerning the resale destination of the gas sold under all of its various contracts with that company. This information, which was solely in the hands of Southern Union, Resp. App. 3a, was significant because

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to federal controls. *California v. Southland Royalty Co.*, 436 U.S. 519, 525 (1978); *Columbia Gas Transmission v. Allied Chemical Corp.*, 652 F.2d 503, 510 (5th Cir. 1981).

[4] As the trial court found, the lawyers involved believed that there was a high likelihood that the summary judgment would be reversed on appeal. Resp. App. 4a.

it would determine whether the contracts were subject to federal price ceilings. *See* note 3 *supra*.

Southern Union generally evaded Consolidated's inquiries on this subject. Resp. App. 4a-5a. The first draft of the settlement, submitted by Southern Union's attorneys, applied by its terms only to the six contracts named in the complaint. Pet. App. 6a. Consolidated rejected this proposal because it had not yet received a satisfactory answer to its inquiries concerning the resale destination of gas sold under all of the contracts with Southern Union. Southern Union then submitted a second draft, which applied to ten contracts, including the four previously "certificated" by the FPC. *See* note 3 *supra*. The draft stated that the gas from all ten contracts was "resold and consumed solely within the State of New Mexico and therefore . . . not subject to regulation by the Federal Power Commission." Pet. App. 6a.[5] It provided for the same higher future prices under all ten contracts, and included a corresponding increase in the lump-sum payment. Consolidated executed this second draft and, relying upon it, abandoned its appeal, dismissed its case and released its claims against Southern Union.[6]

Just months after the agreement was signed, Southern Union refused to pay the specified prices for gas being delivered under the four contracts for which federal Certificates of Public Necessity and Convenience had previously been issued (the "disputed contracts"). *See* note 3 *supra*. Claiming that it had actually channeled

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[5] As noted above, *see* note 3 *supra*, the resale destination of the gas—*i.e.*, whether it had been transported partially or totally in interstate commerce—was the key to determining whether federal price ceilings applied to the contracts.

[6] The settlement was signed on behalf of Southern Union by its vice-president, Oran L. Haseltine, who was also vice-president of the Gas Company of New Mexico—New Mexico's intrastate gas retailer and the recipient of gas from Southern Union's intrastate line. Pet. App. 6a.

gas under these contracts to its interstate line, Southern Union tendered only the price authorized by federal law for interstate gas. Consolidated responded by filing suit against Southern Union in November 1979 in New Mexico district court, claiming a breach of the settlement agreement. The complaint was later amended to allege fraud and then negligent misrepresentation.[7] Southern Union reacted to the complaint by filing a petition with FERC asking the Commission to exercise primary jurisdiction and to bar the relief sought on grounds of federal preemption. It asked the trial court to stay proceedings pending FERC action on the petition.

The court denied the stay motion but referred to FERC two questions: (1) whether the gas under the disputed contracts was within FERC's jurisdiction and thus subject to federal regulation of prices, and (2) if the gas was jurisdictional, what federal price ceilings applied.[8] On August 20, 1984, FERC responded to the court's questions by finding that the gas was subject to federal regulation, Pet. App. 20a-21a, and setting out the applicable federal ceilings, Pet. App. 21a-24a. In response to Southern Union's petition, it refused to exercise primary jurisdiction over the case or to determine in advance whether any damage award might be preempted. Pet. App. 24a-27a. *See also* Pet. App. D (order denying rehearing).[9]

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[7] The fraud allegation was added in August 1980, eleven months before this Court decided *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981). The negligent misrepresentation claim was added in August 1984.

[8] The court stayed discovery on these issues for 60 days to allow FERC to assert primary jurisdiction as to these issues. FERC did not act on the referral for four years. *See* Pet. App. C.

[9] FERC's ruling on the jurisdictional nature of the gas was affirmed in *Consolidated Oil & Gas, Inc. v. FERC*, 806 F.2d 275 (D.C. Cir. 1986).

On July 12, 1985, the trial court ruled, after a trial, that Southern Union had negligently misrepresented the resale destination of the gas subject to the disputed contracts, thereby breaching a duty it owed Consolidated under New Mexico law. Resp. App. 7a. Finding that Consolidated had reasonably relied on this factual misrepresentation to its detriment by releasing its state-law claims against Southern Union,[10] the court awarded tort damages. Southern Union appealed the decision to the Supreme Court of New Mexico, arguing that the tort judgment was preempted by federal law, and simultaneously filed a petition with FERC raising the same issue.

FERC rejected Southern Union's preemption argument on June 19, 1986. Pet. App. E. It concluded that the trial court's award did not represent payments in excess of applicable federal ceiling prices. The Commission found that the trial court did not attempt to determine the nature and proper price of the gas at issue; rather, the court examined the duty that Southern Union owed Consolidated to provide accurate information concerning the resale destination of its gas. FERC held that the award of tort damages for negligent misrepresentation, like that for the actual and exemplary damages for fraudulent misrepresentation at issue in *Gulftide Gas Corp.*, 31 Fed. Energy Reg. Comm'n Rep.

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[10] Consolidated had settled its claims under the indisputably "intrastate" contracts for a lump sum plus revised pricing terms for the future. If the settlement had not included an additional lump sum and additional pricing changes linked to the four disputed contracts, Consolidated could have demanded a different arrangement with respect to the intrastate contracts. The Final Order of the New Mexico Public Service Commission approving this and several related settlements noted that they provided for payments totalling less than half of the outstanding potential liability. *In the Matter of Southern Union Gas Company's Application Seeking Increases in its Cost of Gas Charged to the Adjustment Account* [*etc.*], Case No. 1179 (N.M.P.S.C. June 22, 1976), ¶¶ 7, 13 (Resp. App. B).

(CCH) ¶ 61,228 (June 6, 1985), did not interfere with federal regulation of gas pricing, for neither award represented part of the price paid for natural gas. Pet. App. 52a-54a. Additionally, the Commission found that this Court's decision in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (*"Arkla"*), was inapposite. *Arkla* held that the "filed rated doctrine" precluded an award of damages that had the effect of allowing for payment of a higher price than had been filed with FERC for its approval. Here, by contrast, "[t]he Commission [was] not addressing the filed rate doctrine." Pet. App. 54a. The issue was "whether damages awarded in an action based in tort violate the maximum lawful price provision of the NGPA." *Ibid.* FERC held that these tort damages did not increase the price of gas in contravention of the statutory scheme. Southern Union moved for rehearing of this decision. FERC, however, having "reviewed Consolidated's state court damage award, including the amount of damages, the basis for the damages, as well as the relevant facts and circumstances and applicable legal principles," denied rehearing on May 22, 1987. Pet. App. 58a.

The Supreme Court of New Mexico affirmed the damage award on July 9, 1987. Pet. App. A. It too rejected Southern Union's assertion that the award of damages for negligent misrepresentation interfered with federal regulation of natural gas pricing. Its opinion reviewed the relevant facts and law, as well as the concurrent FERC proceedings, before concluding that the tort damages did not conflict with federally regulated prices—an argument that it found to have been "effectively answered in the appropriate federal forum." Pet. App. 12a. The court also found that *Arkla* did not dictate a contrary result. That case was found not to control for two reasons. First, because there was no requirement of "filed rates" in this case,[11] the particular doctrine at

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[11] *See* note 21, *infra*.

issue in *Arkla* was inapplicable. More importantly, the award in the present case did not constitute a component of the contract price of gas, as in *Arkla*, but was compensation for tortious conduct in the context of settlement negotiations.

In November of 1987, FERC, on its own motion, reconsidered its prior order and reaffirmed it in another extensive opinion. Pet. App. G. In deciding that there was no need to interfere with the state judgment, the Commission now chose to rely less on the holding of *Gulftide*, *supra*, which it read as applying to only *exemplary* tort damages, and more on its analysis of the particular facts of this case. It was careful to note that some tort actions might be covert efforts to collect excessive rates for gas. But it concluded that, "[i]n this case, it is not the conduct under the contracts that is at issue, but the conduct surrounding settlement negotiations that prompted Consolidated to dismiss litigation against Southern Union." Pet. App. 66a. Because negligent misrepresentation during the course of the earlier settlement is an issue remote from the gas contracts themselves, FERC reaffirmed its view that this tort action was not " 'inextricably intertwined' " with the pricing of gas and thus did not interfere with federal regulations. Pet. App. 67a.

Southern Union's appeal from this FERC ruling is now pending in the United States Court of Appeals for the D.C. Circuit.

ARGUMENT

This case does not warrant further review for two reasons. First, as the various FERC opinions make clear, the New Mexico Supreme Cour was correct in ruling that the compensation paid respondent for a state-law tort would not, in this case, interfere with federal regulation of natural gas pricing. Second, even if there were some doubt about the merits of this ruling, the case is highly fact-specific and has been treated as such by FERC and the courts below. There is no reason for this

Court to get involved at this stage and thereby potentially disrupt FERC's efforts to work out the appropriate accommodation of state and federal interests in this area on a case-by-case basis.

I. The Ruling Below was Clearly Correct.

Despite persistent efforts, Southern Union has so far failed to convince a single judge or FERC Commissioner that the award of tort damages for negligent misrepresentation in this case interferes with federal regulation of gas pricing.[12] The reason for this unanimity is the fact that the damages awarded here are not payments for federally regulated gas but compensation for respondent's justifiable and detrimental reliance on Southern Union's misstatements of fact in the course of the settlement of a state lawsuit that was totally unrelated to federal concerns. As the New Mexico Supreme Court put it succinctly, "[i]n the present case, the trial court awarded damages, *not as contract prices, but as consequences for tortious conduct.*" Pet. App. 12a (emphasis added).

The final FERC opinion, issued just last November, made the same point in greater detail. FERC noted that the "central question" was "whether the damages awarded by the New Mexico court for negligent misrepresentation do or do not represent payments for gas sold." Pet. App. 64a. Since the damages here represent, not payments for gas, but compensation for the "valuable consideration" respondent gave up in settling the earlier case on the basis of petitioner's misrepresentations, FERC approved the damage award. *Ibid.* In so doing, it agreed with Southern Union that the distinction between "tort" and "contract" damages may not always provide an answer to the preemption issue, but analyzed the particular function of the damage award at issue

[12] Nor has petitioner pointed to any other case that conflicts with the ruling below.

and found no conflict with paramount federal policies. Pet. App. 65a-67a.

Petitioner contends here, as it has throughout this litigation, that Consolidated is simply using a tort theory to enforce its contractual right to payment of higher prices under the four disputed contracts than are permitted under federal law. This argument, however, ignores the key facts that led FERC and the court below to approve respondent's tort theory. Southern Union's misrepresentation concerning the jurisdictional status of the four disputed contracts was what led Consolidated to settle its claims under other concededly intrastate contracts for a specified lump sum and specified future prices.[13] Absent this misrepresentation, Consolidated could have demanded comparable consideration in the form of either a higher lump-sum payment or higher future payments under the six intrastate contracts, or it could have litigated its claim under those contracts to a final judgment. In sum, what respondent lost by virtue of the misrepresentation was part of the consideration it had bargained to receive in settling a purely state-law claim.

FERC and the courts below thus were clearly correct in concluding that, while other cases may raise different concerns, the facts here warrant relief: a party should not be able to obtain settlement of an independent state-law claim by misrepresenting the jurisdictional nature of certain gas contracts and then escape the consequences of its tortious conduct by pleading preemption.[14] FERC's

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[13] Respondent had rejected an earlier settlement draft proposing a compromise that applied only to the six contracts named in the complaint.

[14] This case would be far different, of course, if the only contracts between petitioner and respondent were federally regulated, and respondent was simply using a tort theory to evade federal price ceilings. Petitioner's attempt to characterize this as such a case is simply unavailing.

complete agreement with the state court in this case contrasts sharply with other preemption cases in which this Court has granted review.[15] This fact, combined with the persuasiveness of the analyses undertaken by the Commission and the courts, make it clear that Supreme Court involvement in the case is unnecessary.

Petitioner, of course, mounts a number of attacks on the reasoning of FERC and the New Mexico courts. None, however, is convincing.

1. *This Case and Arkla.* First, petitioner argues that the ruling below is inconsistent with this Court's decision in *Arkla, supra.* In so arguing, however, Southern Union reads that case far too broadly. The sole issue before this Court in *Arkla* was whether the filed rate doctrine "forbids a state court to calculate damages in a breach-of-contract action based on an assumption that had a higher rate been filed, the Commission would have approved it." 453 U.S. at 573. The Court vacated the damage award because, "under the filed rate doctrine, the Commission alone is empowered to make [the] judgment [of rate reasonableness], and until it has done so, no rate other than the one on file may be charged." *Id.* at 581. *See also Nantahala Power & Light Co. v. Thornburg,* 106 S. Ct. at 2349, 2355 (1986) (explaining *Arkla*). *Arkla* thus stands for the proposition that a state court may not mandate payment of a purchase price for gas that has not been approved by FERC and thus violates federal law.

The courts below were correct in finding that *Arkla* did not apply here because no FERC decision was being assumed, bypassed, or contradicted and because no provision of federal law was otherwise being violated. The underlying rationale for this conclusion—one that FERC

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[15] *See, e.g., Nantahala Power & Light Co. v. Thornburg,* 106 S. Ct. 2349 (1986); *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 580 (1981).

itself expressly approved—was the fact that the damages here were not payments for gas but compensation for independent misconduct. They thus did not serve to bypass federal price ceilings or FERC jurisdiction.[16] To be sure, the *magnitude* of the injury was necessarily calculated as the amount of bargained-for consideration that respondents, having been misled into believing that the four disputed contracts involved non-jurisdictional gas, could not collect, after having compromised its state-law claims under the intrastate contracts. But the injury itself was separate from the contracts and did not relate to any lost payments for *interstate* gas. It thus could be compensated without implicating federal concerns.[17]

As FERC itself recognized, this distinction is reinforced by the fact that, while purchase prices are passed on to consumers, these "tort damages do not represent costs paid for gas, and therefore cannot be recovered in

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[16] In *Arkla*, FERC had found that the contract damages that had been awarded would represent an increase in the price of gas. *See* 453 U.S. at 549 n.10. In this case, by contrast, FERC found that "the events in question . . . do not involve a situation where Southern Union agreed to buy and Consolidated agreed to sell certain amounts of gas at certain prices. . . . Here, instead, the damages represent what was suffered by Consolidated as a result of a misrepresentation in the context of a settlement of a claim under state jurisdiction which is clearly a matter of state concern." Pet. App. 64a.

[17] Much of petitioner's argument is based on the fact that the damage award was equal to the amount that Consolidated could have collected under the disputed contracts if they were treated the same as the other six "intrastate" contracts and thus not federally regulated. But this fact does not indicate that the damages were covert payments for gas. As FERC stated, because the "price differential between interstate and intrastate rates" reflects the value of the consideration that Consolidated thought it was receiving based on petitioner's misrepresentations, the "fact that the court used [it] to determine the damages does not negate the court's finding of tortious misconduct from which these damages arise." Pet. App. 54a.

current rates." Pet. App. 65a. The "damages will be paid by Southern Union's shareholders. Accordingly . . . the state court judgment does not violate the NGA or the NGPA." *Id.*[18]

In this regard, it is noteworthy that in *Arkla* this Court countenanced the possibility that fraudulent conduct by a purchaser might be sufficient to justify a producer's failure to comply with applicable requirements of prior FERC approval of higher rates and thereby allow it to obtain a higher *purchase price* for interstate gas. 453 U.S. at 583 & n.13. That kind of tort theory, of course, carries with it a significantly greater risk of interference with paramount federal pricing policies than in the present case. Here, by contrast, there has been no attempt whatever to bypass federal price controls under the guise of a tort theory. The damages are simply compensation for independent misconduct.[19]

In the course of its discussion of *Arkla*, petitioner attempts to fabricate an important legal issue by focusing on a single comment of the New Mexico Supreme Court, which distinguished *Arkla* in part on the basis that it involved the filed rate doctrine, whereas here there was

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[18] This fact is sufficient to alleviate any concern that producers and purchasers will conspire to use a tort theory to bypass federal price ceilings. A purchaser will not be tempted to enter such an arrangement if it knows that the added costs it is incurring cannot be passed on to consumers.

[19] For this reason, this would not, as petitioner suggests, Pet. 21-22, be an appropriate case in which to examine the "tort" questions left open in *Arkla*. In any event, we note that Congress in the NGPA has specified price ceilings and exempted all gas from the NGA requirement that rates be filed with and approved as reasonable by FERC. 15 U.S.C. § 3431(b)(1)(A) (1982); *Public Service Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319, 332, 334-36 & nn.12, 14 (1983). Therefore, the issues raised in *Arkla* may never recur.

no such filing requirement.[20] This comment, however, hardly suggests that anything was improper in the court's overall analysis. To begin with, the court's comment that this is not a "filed rate" case was both accurate [21] and premised on earlier comments by FERC.[22] Even more significant is the fact that the court, far from rejecting as irrelevant the underlying principles set forth in filed rate cases like *Arkla* as petitioner suggests, went on to base its holding primarily on the key distinction between this case and *Arkla*. It relied on the fact that here, unlike in *Arkla*, "the trial court awarded damages, not as contract prices, but as consequences for tortious conduct." Pet. App. 12a. That basic fact, of course, is the main justification for the damage award at issue here—a justification that FERC itself has repeatedly endorsed.

2. *General Preemption Analysis.* Having failed to establish any inconsistency with *Arkla*, Southern Union goes on to argue that the decision below conflicts with general principles of preemption analysis established by this Court. In particular, it suggests that the ruling below was based on a wooden distinction between "contracts" and "torts" rather than a functional analysis of the impact of respondent's cause of action on the federal regulatory scheme. Pet. 15-18. Nothing could be further from the truth.

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[20] Pet. 13-15. *See* Pet. App. 12a ("The Commission distinguished *Arkla* because it was decided on the basis of the filed rate doctrine, which is inapplicable to the present proceeding. We agree.")

[21] The prices charged under the four contracts prior to 1978 did not have to be filed as rates with FERC under the NGA because Consolidated had a blanket small producer certificate. *See* 18 C.F.R. § 157.40 (1978). After 1978, section 601(b)(1)(A) of the NGPA exempted the gas from the filing requirements of the NGA. *Mid-Louisiana Gas, supra.*

[22] *See* Pet. App. 54a ("The Supreme Court's decision [in *Arkla*] . . . was based on the filed rate doctrine. The Commission is not addressing the filed rate doctrine in this case.")

The structure of preemption analysis is well settled. *See, e.g., Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-82 (1983); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203-04 (1983); *Chicago & N.W. Transp. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-18 (1981). "[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). This assumption must of course yield when Congress has expressly preempted state law[23] or has so pervasively regulated an entire sphere as to leave no room for enforcement of state laws on the same subject.[24] It must also yield when there is a specific conflict with federal law, such as where (1) "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or (2) state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). This Court has stated that the preemption inquiry " 'is essentially a two step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict.' " *Kalo Brick, supra*, 450 U.S. at 317-18 (quoting *Perez v. Campbell*, 402 U.S. 637, 644 (1971)).

The courts and the Commission in this case followed the two-step preemption inquiry enunciated by this Court.

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[23] *See, e.g., Aloha Airlines, Inc. v. Director of Taxation*, 464 U.S. 7 (1983); *see generally Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 203 (1983); *Rath Packing Co., supra*, 430 U.S. at 525.

[24] *See, e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973).

The Supreme Court of New Mexico first ascertained the nature of the tort—*i.e.*, negligent misrepresentation in the settlement of a state lawsuit—and the nature of the relevant federal law—*i.e.*, regulating interstate gas prices. The court recognized that federal regulation is undermined by state enforcement of contracts contrary to the federal scheme, but it found that state and federal law did not conflict in this case because "the trial court awarded damages, not as contract prices, but as consequences for tortious conduct." Pet. App. 12a.

FERC made the basic inquiry three times and consistently came out the same way. First, in its June 1986 order declaring that the award did not represent rates in excess of applicable NGPA ceiling prices, the Commission noted that the award was for negligent misrepresentation and that the federal law set maximum prices for natural gas. It found that the two did not conflict because, as compensation for tortious conduct in the settlement of a state lawsuit, "[t]he award of damages in this case does not amount to an impermissible regulation of the first sale of natural gas in violation of the NGPA." Pet. App. 51a. Second, in denying Southern Union's motion for rehearing of the 1986 order, a differently constituted FERC again found that the damages awarded were not part of the price of gas. Pet. App. 57a-58a. Third, in FERC's final order in this case, it reaffirmed its prior decision that "the tort action was not so 'inextricably intertwined' with the pricing provisions of the NGPA that a finding of preemption was required." Pet. App. 67a.[25]

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[25] The relevant legislative history here argues for the same result. The legislative history of the 1938 Natural Gas Act makes clear that

> sales for resale, or so-called wholesale sales, in interstate commerce ([including] sales by producing companies to distributing companies) . . . have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. ***The basic purpose of the present***

Contrary to petitioner's suggestion, these analyses were not based on unquestioning acceptance of respondent's "artful pleading" of this case as a "tort" action. To the contrary, petitioner presented this specific argument to FERC, Pet. App. 57a, 65a, and the Commission agreed that the preemption analysis must depend, not on the label given to an action, but on "an analysis of the specific facts presented to determine whether the damages are part of the price paid for natural gas." Pet. App. 66a. In so holding, the Commission cited and distinguished some of the same preemption cases cited in the petition.[26] These cases, involving federal regulatory schemes that are far more pervasive than the federal regulation of natural gas prices, hardly suggest that any federal involvement with a particular industry precludes prosecution of state-law tort actions.[27] To the contrary,

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legislation is to occupy this field in which the Supreme Court has held that the States may not act.

H.R. Rep. No. 709, 75th Cong., 1st Sess. 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 2 (1937) (citations omitted) (emphasis added), *quoted in Eagerton, supra*, 462 U.S. at 184-85. Because states could impose tort obligations on producers before the enactment of the NGA, Congress did not with its passage occupy that arena. Nor has the 1978 Natural Gas Policy Act extended federal regulation of gas pricing to the realm of state tort law.

[26] *See* Pet. App. 66a (citing *Kalo Brick, supra*; *Amalgamated Ass'n of Street, Electric Railway & Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971); and *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468 (9th Cir. 1984)). Petitioner also cites *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 (1985), for the proposition that tort claims may be preempted if they are "inextricably intertwined" with federal labor contract issues. Pet. 17. It fails to note that FERC expressly rejected the notion that the instant tort claim is "inextricably intertwined" with federal regulation of gas prices. Pet. App. 67a.

[27] In *Kalo Brick, supra*, the Court dealt with one of "the most pervasive and comprehensive of federal regulatory schemes"—the Interstate Commerce Act. 450 U.S. at 318. It simply held that since the ICC is specifically authorized to regulate a railroad's

they emphasize the need for careful examination of the particular federal and state laws at issue.[28] Such an examination occurred here, and the ruling below of nonpreemption is unassailable in view of the fact that this tort action in no way bypasses federal limits on payments for purchase of natural gas.

3. *Federal Duties and the State Tort Theory.* Petitioner's final argument is that the findings of negligent misrepresentation and justifiable reliance made by the state court are inconsistent with respondent's duties under federal law—specifically its duty to be aware of all gas sales that are subject to federal regulation. Here again, however, petitioner has not come up with a valid reason to preempt this state tort judgment.

In this context, it is important to recognize the specific findings and conclusions of the state trial court. The court found that (1) Southern Union had the unilateral power to determine whether gas under the disputed contracts would be shipped in interstate commerce

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abandonment of lines, and approved abandonment in that case, a state court tort action raising the same question was preempted.

The remaining cases cited by petitioner involved labor law, where Congress has passed sweeping regulatory legislation. *See International Longshoreman's Ass'n v. Davis*, 106 S. Ct. 1904, 1911-13 (1986). Even in this field, however, this Court has approved state tort actions in appropriate circumstances. *See, e.g., United Constr. Workers v. Laburnum Constr.*, 347 U.S. 656 (1954). *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290 (1977); *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966).

Similarly, pervasive federal regulation of other areas has not preempted all state tort actions. For example, the Court has found that "the Federal Government has occupied the entire field of nuclear safety concerns." *Pacific Gas & Electric, supra*, 461 U.S. at 212. Nonetheless, some state tort actions are not preempted by federal regulation in the field of nuclear energy. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

[28] *See, e.g., Kalo Brick, supra*, 450 U.S. at 317-324; *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 295-301 (1977).

and thus become subject to federal regulation, (2) Southern Union had knowledge about whether interstate shipment has occurred, whereas Consolidated did not, (3) Southern Union falsely represented in the 1976 settlement agreement that all gas under the contracts had been shipped intrastate, and (4) "CONSOLIDATED was justified and entitled to rely on the representation of SOUTHERN UNION and did, in fact, rely upon that representation." Resp. App. 3a, 7a.

In light of these findings, there are at least two problems with petitioner's argument that the state tort theory is inconsistent with relevant federal duties. First, Southern Union has pointed to no provision of federal law requiring respondent to do anything more than it did here—*i.e.*, to make inquiries concerning the resale destination of its gas to the party with the sole knowledge of and control over that issue.[29] It was only when petitioner assured respondent that gas under the contracts had never been shipped interstate that Consolidated justifiably relied on this characterization in accepting an overall package of consideration to settle the earlier lawsuit. It was hardly inconsistent with federal policies for it to do so.

Second, even assuming that petitioner could establish that respondent had a federal legal duty to do the impossible—*i.e.*, to determine that Southern Union was misrepresenting the intrastate nature of the shipment of gas sold under the four contracts—the existence of such a duty still would not require preemption here. The reason is that the state tort claim at issue would complement, rather than interfere with, such a federal duty. Producers will be much less likely to have accurate knowl-

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[29] As noted above, *see* note 3 *supra*, gas under a given contract does not become subject to federal price ceilings until it actually flows in interstate commerce. The existence of a federal certificate covering a given contract, absent proof of interstate transport, does not bring federal price regulation into play.

edge of the jurisdictional status of their gas if, when they sell to a purchaser like Southern Union that has the unique ability to direct gas into its choice of interstate or intrastate lines, that purchaser can misrepresent the relevant facts with impunity. In sum, petitioner's effort to conjure up a conflict between state and federal interests in this case is simply unconvincing.

II. There is No Reason to Review a Fact-Specific Ruling in an Area Where FERC Itself Is Just Beginning to Elaborate Rules on a Case-by-Case Basis.

Even assuming that this Court were to have doubts about the merits of the decision below, there still would be no reason to grant review here. The facts of this case—involving a negligent misrepresentation inducing detrimental reliance in the settlement of a state-law case—are unlikely to recur. Moreover, both the court below and, even more clearly, FERC decided the preemption issue on the basis of this case's unique facts. Other tort claims, in other factual settings, may be treated differently. The applicable rules will be developed through a process of case-by-case adjudication.

Because the rulings below establish no governing law outside the context of this case's relatively unique facts, it can hardly be said that the case presents a question of exceptional importance warranting the attention of this Court. But the argument against Supreme Court review at this stage is even stronger than that. FERC, while indicating a desire to work out issues of preemption of state torts on a case-by-case basis, has had only this case and one other,[30] since *Arkla* in 1981, in which to address these issues. If the Court were to enter this field now, its holding might well interfere with the orderly development of the applicable principles at FERC and in the courts. There is no reason to run this risk

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[30] *Gulftide, supra.*

in a case that otherwise bears so few of the hallmarks of a case justifying Supreme Court review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

FIRST JUDICIAL DISTRICT COUNTY
OF SANTA FE
STATE OF NEW MEXICO

No. SF 79-2161 (C)

CONSOLIDATED OIL & GAS, INC.,
Plaintiff,

vs.

SOUTHERN UNION COMPANY,
GAS COMPANY OF NEW MEXICO,
AND SOUTHERN UNION
GATHERING COMPANY,
Defendants.

[Filed July 12, 1985]

DECISION OF THE COURT

THIS MATTER came before the court for trial to the bench on the merits on April 1, 1985. Plaintiff appeared by counsel, Michael Campbell and Bradford Berge; Defendants appeared by Victor Ortega, Leo J. Hoffman and Bruce E. Henderson. At that time, evidence was taken and arguments heard by the court after which the court determined the matter in favor of the Plaintiffs and awarded appropriate damages. The court's Decision is based upon the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Consolidated Oil & Gas, Inc. (CONSOLIDATED) is a Colorado corporation authorized to do business in New Mexico.

2. Southern Union Company is a Delaware corporation authorized to do business in New Mexico; Gas Com-

pany of New Mexico was, at all material times, a division of the Southern Union Company; Southern Union Gathering Company was, at all material times, a Delaware corporation, a wholly-owned subsidiary of the Southern Union Company, and authorized to do business in New Mexico. (SOUTHERN UNION)

3. At all material times, the defendants acted jointly for and on behalf of one another.

4. SOUTHERN UNION buys gas at the wellhead from suppliers in the San Juan Basin, including CONSOLIDATED; SOUTHERN UNION resells the gas both solely within New Mexico and outside the state in interstate commerce.

5. Before 1974, CONSOLIDATED and SOUTHERN UNION had entered into various contracts for the sale and purchase of gas at a time when federal regulation of the oil and gas industry was minimal.

6. These contracts included the August 24, 1956 Contract, the January 1, 1958 Contract, the September 26, 1960 Contract and the November 26, 1960 Contract, collectively called the Disputed Contracts.

7. In the mid-60's, federal regulation created a market environment which made it beneficial for gas suppliers, like CONSOLIDATED, to allow SOUTHERN UNION to determine whether gas would be sold within the state and outside the state in order that all suppliers could guarantee a fair share of the market.

8. In order to participate, CONSOLIDATED was obliged to apply to the federal regulatory agency, then the Federal Power Commission, to authorize the sale of gas to SOUTHERN UNION in interstate commerce for resale.

9. The application was granted by the FPC and CONSOLIDATED was issued a Certificate of Public Convenience and Necessity, relating to the four Disputed Contracts.

10. At the time, CONSOLIDATED had no legal staff and was assisted in the drafting of the application, its filing and in the pursuit before the Commission of the Certificate of Public Convenience and Necessity by attorneys employed by SOUTHERN UNION.

11. SOUTHERN UNION was, in comparison to CONSOLIDATED, a very large company, sophisticated in the field and possessed of a sizeable and experienced legal staff.

12. SOUTHERN UNION ran two parallel underground pipelines in the San Juan Basin, one of which transported gas for resale solely within the State of New Mexico, the second of which transported gas for resale partly within the State of New Mexico in intrastate commerce and partly outside the State of New Mexico in interstate commerce.

13. SOUTHERN UNION possessed the sole ability to determine the pipeline through which gas produced from any particular well subject to the Disputed Contracts would be transported and, by that determination, whether gas from that well would flow in interstate or intrastate commerce.

14. SOUTHERN UNION possessed the ability to easily and unilaterally switch a producer's well from one pipeline to the other.

15. Only SOUTHERN UNION possessed the knowledge of the resale destination of the gas covered by the Disputed Contracts and flowing in its pipelines.

16. CONSOLIDATED had no independent knowledge of the resale destination of the gas it sold to SOUTHERN UNION and could only know by asking SOUTHERN UNION for those facts.

17. In the late 60's and early 70's, the market began to favor intrastate sales because interstate sales were so heavily regulated by the federal government; prices for

intrastate gas began to rise substantially beyond those offered for interstate gas.

18. The Disputed Contracts each contained a "favored nations" or price escalation clauses which generally required that SOUTHERN UNION buy gas from CONSOLIDATED at the highest prices paid to any producer in the Basin.

19. In light of increasing federal regulation of natural gas prices, it became increasingly important to determine the resale destination of the gas so as to secure the best possible price.

20. In September 1974, CONSOLIDATED and a number of other producers sued SOUTHERN UNION alleging a breach of the "favored nations" clauses in those contracts for gas sold in intrastate commerce but did not include the Disputed Contracts as they were controlled by the FPC.

21. SOUTHERN UNION prevailed in the District Court and the suit moved into the appellate forum where it was the best judgment of the lawyers involved that the District Court's decision would likely be reversed.

22. SOUTHERN UNION began negotiating settlement agreements with the producers, including CONSOLIDATED.

23. SOUTHERN UNION's goal was to settle all claims and by a date certain in order to gain certain economic or tax advantages.

24. In the course of negotiations, CONSOLIDATED began to focus on the resale destination of its gas, the means by which SOUTHERN UNION could affect sales in interstate or intrastate and ways to avoid federal regulation of its sales.

24. To that end, CONSOLIDATED specifically questioned SOUTHERN UNION on where its gas was being

sold pursuant to its various contracts; SOUTHERN UNION was unwilling or unable to say.

25. In the proposed settlement agreement between CONSOLIDATED and SOUTHERN UNION, 10 contracts were included; some of the Disputed Contracts were among those included in the agreement.

26. The proposed agreement was prepared in draft by lawyers employed by SOUTHERN UNION.

27. The settlement agreement contained a recital which stated that it was recognized by the parties that all of the gas being sold by CONSOLIDATED under the contracts in the settlement agreement, including one of the Disputed Contracts, was resold and consumed solely within the state of New Mexico and therefore such sales were not subject to FPC regulation.

28. The agreement was not satisfactory to CONSOLIDATED because it did not include all of the Disputed Contracts and the agreement was returned to SOUTHERN UNION with a request to include them; no other significant changes were sought.

29. SOUTHERN UNION lawyers prepared a second settlement agreement which now included all of the Disputed Contracts and which included the recital referred to in Finding No. 27.

30. CONSOLIDATED signed the agreement and, relying upon it, abandoned its appeal, dismissed its case and released its claims against SOUTHERN UNION.

31. SOUTHERN UNION's representation in the settlement agreement that the gas covered by the Disputed Contracts was resold and consumed solely within the State of New Mexico and, therefore, not subject to FPC regulation was not true.

32. SOUTHERN UNION knew or should have known it was not true and its principal lawyer conceded that it

was careless on the part of SOUTHERN UNION to include the Disputed Contracts in the agreement.

33. SOUTHERN UNION never intended to treat the gas purchased from CONSOLIDATED as "intrastate" gas and always intended to treat it as "interstate" gas.

34. Sometime after the signing of the agreement, SOUTHERN UNION informed CONSOLIDATED that it had mistakenly included the Disputed Contracts in the agreement and that it intended to tender "interstate" prices for the gas it was to purchase under those Disputed Contracts, notwithstanding the settlement agreement.

35. Based upon the claim of "mistaken inclusion," SOUTHERN UNION tendered to CONSOLIDATED purchase prices based upon "interstate" gas; CONSOLIDATED accepted the tender but specifically did not waive its right to claim "intrastate" prices in accordance with the settlement agreement.

36. In addition to the other agreements, SOUTHERN UNION had agreed to pay a lump sum settlement to CONSOLIDATED which was, in part, predicated on the "intrastate" nature of the gas in the Disputed Contracts; at, or shortly after the signing of the agreement, SOUTHERN UNION paid the sum to CONSOLIDATED.

37. By reason of the misrepresentation and CONSOLIDATED's reasonable reliance thereon, CONSOLIDATED suffered monetary damages which are ascertainable with certainty, are specific and are not speculative in nature.

38. CONSOLIDATED has suffered the loss of $8,427,978, which is the amount equal to the difference between what it was paid by SOUTHERN UNION under the settlement agreement and the amount it would have been paid had the representations of SOUTHERN UNION been true.

39. The delay in prosecution of this litigation is largely due to the efforts of SOUTHERN UNION to assert or secure federal jurisdiction over the subject matter so as to remove it from the jurisdiction of this court.

CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties and the subject matter of this litigation, with respect to the construction of the settlement agreement and the common law tort claims.

2. Under the facts of this case, SOUTHERN UNION owed a duty to CONSOLIDATED to truthful and accurate information concerning the resale destination of gas covered by the Disputed Contracts.

3. SOUTHERN UNION, by their words and conduct, represented to CONSOLIDATED that "all of the gas" under the Disputed Contracts "was resold and consumed solely within New Mexico."

4. That representation was not true.

5. CONSOLIDATED was justified and entitled to rely on the representation of SOUTHERN UNION and did, in fact, rely upon that representation.

6. By signing the settlement agreement, dismissing its lawsuit against SOUTHERN UNION and releasing its claims against SOUTHERN UNION, CONSOLIDATED relied to its detriment on the untrue representation of SOUTHERN UNION.

7. In making the untrue representation, SOUTHERN UNION failed to exercise reasonable care and competence in obtaining and communicating accurate information well within their knowledge and were negligent in making the untrue representation.

8. As a direct and proximate cause of the conduct of SOUTHERN UNION, CONSOLIDATED has been damaged in the amount of $8,427,978.

9. In the court's discretion, CONSOLIDATED is entitled to pre-judgment interest on such sum in the amount of $2,595,989, which is calculated at 6% simple interest, the rate prevailing at the time the lawsuit was brought.

10. SOUTHERN UNION did not prove their affirmative defenses or their counterclaim and, on the same grounds as it has found in favor of CONSOLIDATED, it finds against SOUTHERN UNION on the counterclaim.

11. Any proposed Findings and Conclusions which are inconsistent with the foregoing are herewith specifically rejected.

/s/ Art Encinias
ART ENCINIAS
District Judge

APPENDIX B

BEFORE THE NEW MEXICO PUBLIC SERVICE COMMISSION

Case No. 1179

IN THE MATTER OF SOUTHERN UNION GAS COMPANY'S APPLICATION SEEKING INCREASES IN ITS COST OF GAS CHARGED TO THE ADJUSTMENT ACCOUNT; AND FURTHER REQUESTING AUTHORIZATION WITHIN A SIX MONTH AMORTIZATION PERIOD OF AN AMOUNT EQUAL TO THE DIFFERENCE BETWEEN THE ADJUSTMENT ACCOUNT UNDER ORDER 375 AND THE ADJUSTED 43¢/MCF YEAR ENDED PROPOSED TO BE CHARGED TO THE ADJUSTED ACCOUNT

FINAL ORDER

STATEMENT OF THE CASE:

On October 30, 1974, Gas Company of New Mexico (a division of Southern Union Company, formerly called Southern Union Gas Company, and referred to herein as "Gas Company") filed its application with the New Mexico Public Service Commission (herein named Commission) initiating this proceeding. Hearings were held, and on December 31, 1974, the Commission issued its Findings of Fact and Order herein authorizing Gas Company to make certain collections from its customers, directing that the amounts so collected be held in a separate account, and terminating the proceeding pending the outcome of certain litigation described therein, all as is more fully set forth in the Findings of Fact below. The Order of December 31, 1974, was appealed to the District Court of Santa Fe, New Mexico, in Cause No. 49244 and was affirmed by the Court.

On November 7, 1975, Intervenor Southwest Valley Area Council, filed herein its motion for an order grant-

ing a refund to the customers of Gas Company. A hearing was held upon said motion, and the motion was denied by an order entered on January 13, 1976.

On May 21, 1976, Gas Company filed herein its Motion for Approval of Proposed Settlement Agreements and Authorization of Distribution of Funds. The Commission, by Order of Hearing and of Notice entered May 26, 1976, found that it was in the public interest to hold a formal hearing on the questions raised by the said Motion and ordered a hearing to be held on June 14, 1976.

Proof of publication of a copy of the said Order of Hearing and of Notice once in a newspaper of general circulation in each county wherein Gas Company does business at least ten days prior to the date set for hearing has been furnished to the Commission.

In addition to the interventions previously allowed by the Commission in this proceeding, namely, interventions by Public Service Company of New Mexico, Southwest Valley Area Council, Town of Clayton, Union County, and the Attorney General of New Mexico, a Petition for Leave to Intervene was filed by J. Walter Kellman, and such Petition was granted at the hearing on June 14, 1976.

At the appointed time and place the hearing was duly held and was completed on June 15, 1976. Chairman Richard P. Montoya and Commissioner Gary Blakeley were present throughout the hearing.

APPEARANCES:

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For Public Service Company of New Mexico:

Richard B. Cole, Esq.
Albuquerque, New Mexico

For J. Walter Kellman:

J. Walter Kellman, pro se
Albuquerque, New Mexico

For the Commission:

Leonard A. Helman, Esq.
Santa Fe, New Mexico

Having heard the testimony, considered the evidence and being otherwise fully informed in the premises.

The Commission F I N D S :

1. The Statement of the Case, above, is adopted by these Findings and is incorporated by reference herein.

2. Gas Company of New Mexico is a division of Southern Union Company (formerly Southern Union Gas Company), a Delaware corporation duly authorized to transact business in the State of New Mexico as a public utility under the New Mexico Public Utility Act.

3. This Commission has jurisdiction over the parties to this proceeding and over the subject matter of this proceeding.

4. On December 31, 1974, this Commission issued its Findings of Fact and Order (hereinafter called "Order 1179") in this proceeding, authorizing and directing Gas Company to make certain charges to the Adjustment Account (as defined in Section 20 of Gas Company's Rules and Regulations of Service on file with this Commission, hereinafter called "Rule 20"), and to certain of its Unaffected Rate Schedule customers, all as more fully set forth in its Order. Order 1179 further directed that the amounts collected by Gas Company pursuant thereto in excess of current wellhead gas costs actually paid were to be invested by Gas Company in certain securities. The funds so invested, together with the interest earned thereon, were to be used by Gas Company for the discharge of any liabilities, including interest, that might be finally determined to be payable by Gas Company for increased wellhead gas costs from and after January 1, 1975. The Commission made no decision on collecting for the period from June 21, 1974 to December 31, 1974. The amounts of such funds, including interest earned thereon, not finally determined to be required for the discharge of such liabilities, were to be refunded to Gas Company's customers as the Commission might then direct.

5. On December 14, 1974, the Commission issued its Order No. 375 (hereinafter called "Order 375"), referred to in Finding No. 7, of Order 1179 and a copy of which was admitted into evidence during the December 1974 hearing in this proceeding as Petitioner's Exhibit 1. In Order 375, the Commission authorized and directed Gas Company to make certain charges to its Affected Rate Schedule customers and directed that if a lesser price for gas could be sustained by Gas Company, the difference between the price authorized in Order 375

and the actual cost of such San Juan Basin gas to Gas Company, with interest, would be refunded by appropriate credits to the Adjustment Account. As Stated in Finding No. 7 of Order 1179, the authorization granted to Gas Company in Order 375 resulted from Gas Company's exposure to unrecoverable increased gas costs entailed by the contention that Gas Company was entitled to pay the San Juan Basin producers under certain concepts of vintaging then in effect.

6. Claims for increased wellhead gas costs, irrespective of the "vintage" of the gas sold, were asserted against Gas Company in two actions filed in the District Court of Santa Fe County, New Mexico, Cause Nos. 48483 and 48543, as described in Finding No. 10 in Order 1179, as well as an action instituted on February 5, 1975, in Dallas County, Texas, Cause No. 75-1218-A, styled *Aztec Oil and Gas Company v. Southern Union Gas Company and Southern Union Gathering Company.* These actions are hereinafter referred to collectively as "the Producer Litigation". As set forth in Finding No. 11 and 12 in Order 1179, Gas Company's liability, if any, to each of its other San Juan producers is similar to that asserted against it in the Producer Litigation.

7. The aggregate liability to which Gas Company is subjected (either directly or on account of its wellhead purchases of gas through Southern Union Company's wholly-owned subsidiary, Southern Union Gathering Company) as a result of the claims asserted in the Producer Litigation and similar claims by Gas Company's other San Juan Basin producers amounted, as of the end of May, 1976, to $36,606,634.60 (which amount includes estimates for April and May, 1976), inclusive of interest, or some greater amount which could result from an adverse decision on the "fair market value" issue referred to in Finding 10, below.

8. The amounts billed by Gas Company to its customers (including Southern Union Gathering Company's

customer, El Paso Natural Gas Company) under the provisions of Order 375 and Order 1179, with interest thereon as provided in said Orders, is hereinafter called the "Contingency Fund". As of the end of May, 1976, the Contingency Fund aggregated $23,146,503.35 (which amount includes estimates for May, 1976).

9. The difference between the liability to which Gas Company is exposed and for which it has billed its customers under the provisions of the two Orders constitutes a serious and imminent threat to the financial integrity of Gas Company as a public utility within the State of New Mexico. Further, in the event such liability is ultimately established and required to be discharged by Gas Company, its only recourse will be to amortize the additional gas costs so determined through charges to its customers.

10. The potential liability referred to in Findings 7 and 9 above, arises out of the claims in the Producer Litigation for payment to the producers under the "price equalization" clauses in the respective gas purchase contracts between the producers and Gas Company and Southern Union Gathering Company. In addition to such claims, several of the plaintiffs in the Producer Litigation have also asserted claims, pursuant to applicable provisions in their respective gas purchase contracts, for payment at the "fair market value" or "fair field price" of the gas sold under such contracts beginning January 1, 1974. Such claims, if ultimately successful, would result in all other San Juan producers being entitled to payment at the price levels so determined by virtue of their price equalization clauses. If such price levels were determined to be higher than those otherwise asserted in the Producer Litigation, there would be an additional aggregate liability upon Gas Company, not covered by advance collections under Orders 375 and 1179. Such a liability would constitute an additional threat to the financial integrity of Gas Company and would require additional amortization charges in order to be discharged.

11. The New Mexico portion of the Producer Litigation is presently pending before the New Mexico Supreme Court on appeal from the District Court of Santa Fe County. The District Court ruled in favor of Gas Company on its defenses to the Claims asserted by the producers under the price equalization provisions of their respective gas purchase contracts. The District Court has not ruled on the fair market value claims. The questions involved on the appeal to the Supreme Court are questions of first impression as to which there is a reasonable basis for difference of opinion. A strong possibility exists that the Supreme Court will reverse the District Court, thereby exposing Gas Company to liability for the full $36 million of additional gas costs. The Texas portion of the Producer Litigation is presently awaiting trial.

12. In order to avoid the hazards and uncertainties of litigation, and in order to secure for itself and its customers the benefits of a compromise and settlement of the Producer Litigation, Gas Company has engaged in negotiations with the various producers involved in such litigation in an effort to bring about resolution of the controversies involved. These negotiations have recently been concluded and have culminated in tentative agreements, subject to certain contingencies, with the producers who are plaintiffs in the Producer Litigation. All of the claims against Gas Company would be dismissed with prejudice and Gas Company would enter into new or supplemental gas purchase contracts with such plaintiffs. Copies of the proposed settlement agreements, including the provisions of such new or supplemental gas purchase contracts, and of the proposed Stipulation of Dismissal to be filed with the District Court of Santa Fe County, were admitted into evidence in this proceeding.

13. Under the terms of the proposed settlements, Gas Company would distribute from the Contingency Fund $16,093,452.59 (subject to adjustment as provided in

Finding 15 below) to its San Juan Basin producers, including the plaintiffs in the Producer Litigation, in proportion (with one minor exception) to the amounts of their respective claims against Gas Company. The balance of the Contingency Fund, $7,053,050.76, would be available for refund or other credit to Gas Company's customers (including Southern Union Gathering Company's customer, El Paso Natural Gas Company in the manner hereinafter directed.

14. The proposed settlement of the Producer Litigation is fair and reasonable and in the public interest.

15. That portion of the Contingency Fund to be distributed to Gas Company San Juan producers should be distributed as follows: Gas Company should calculate the actual amount to which each producer is entitled under the terms of the settlement as described herein for its sales of gas to Gas Company and Southern Union Gathering Company through the end of May, 1976 and should pay such amount to or for the account of such producer from the Contingency Fund. The aggregate payments from the Contingency Fund should not exceed $16,093,452.59. If the total of such payments (hereinafter called "Increased Gas Costs") exceeds $16,093,452.59, the difference should be paid from Gas Company's general corporate funds and should be charged to the Adjustment Account under Rule 20. If such total is less than $16,093,452.59, the difference should be credited to the said Adjustment Account.

16. The amount to be refunded to Gas Company's Affected Rate Schedule customers under the settlement as approved herein should be refunded by check to each of such customers, unless the amount of the refund due is less than one dollar, in which case the refund may be credited to the customer's next bill. Each Unaffected Rate Schedule customer may elect to receive its refund by check or through a credit to a future bill.

17. The portion of the Contingency Fund remaining after distribution of the amount due to the producers pursuant to Finding 15 above should be distributed as follows: Gas Company should determine the portions of Increased Gas Costs attributable to its Affected Rate Schedule customers and Unaffected Rate Schedule customers, respectively, for each month during the period from January, 1974-May, 1976. The dollar amount attributable to all Affected Rate Schedule customers should then be divided by the total volume of gas consumed during the period from January, 1975 to May 1976 by all Affected Rate Schedule Customers and the resulting refund quotient (expressed in cents to the nearest tenth, per Mcf) should be multiplied times the actual volume of gas consumed by each Affected Rate Schedule customer during the same period. The product will constitute the amount to be refunded to each Affected Rate Schedule customer, and shall include an amount attributable to gross receipts taxes, both state and local. The portion attributable to Unaffected Rate Schedule customers shall be determined by subtracting from the amount collected from such customer pursuant to Order 375 and Order 1179 during the period January, 1974-May, 1976 an amount equal to each such customer's proportionate share of the increased gas cost determined in accordance with the terms of each such customer's contract. Within ten business days after the date of this Order, Gas Company should file with the Commission for its review and approval a report showing the amounts attributable to the Affected Rate Schedule customers, and the Unaffected Rate Schedule customers, the derivation of the proposed refund quotient for Affected Rate Schedule customers, an approximate amount of gross receipts taxes to be refunded, and the amount proposed to be refunded to each Unaffected Rate Schedule customer together with all supporting calculations.

18. All expenses derived from calculation, issuance or distribution of any refund checks should be absorbed by Gas Company and not by the customers.

19. The Affected Rate Schedule customers are herein defined as any person, persons, or business entity which has purchased gas from Gas Company during the period from January 1, 1974 to May 31, 1976, as defined in Case No. 1179. Gas Company shall include in the refund plan not only customers who are presently being served but all customers who received service within the period stated above. Gas Company shall use every effort in contacting all Affected Rate Schedule customers who have paid a gas bill during the period of collection. The Commission believes it is appropriate for Gas Company to mail checks to all Affected Rate Schedule customers and to make public announcement that persons at new addresses in this State or elsewhere may claim their refunds.

The Commission O R D E R S:

A. The Proposed Settlement of the Producer Litigation is approved by this Commission, and Gas Company is authorized to enter into settlement agreements with the plaintiffs in the Producer Litigation and into a Stipulation of Dismissal in the New Mexico portion of the Producer Litigation, all such documents to be in substantially the form of the documents admitted into evidence in this proceeding. Within ten business days after execution of such documents, Gas Company shall file with the Commission true copies of all such agreements and the Stipulation of Dismissal as executed.

B. Gas Company is authorized to distribute the portion of the Contingency Fund to be distributed to its San Juan producers in effectuating the settlement, up to a maximum distribution of $16,093,452.59, in the manner set forth in Finding 15 above. Any excess or deficiency between the total of such payments (Increased Gas Costs) and $16,093,452.59 shall be charged or credited to the Adjustment Account under Rule 20 as set forth in Finding 15.

C. If the settlement is consummated as contemplated by this Order and if payments to the producers are made as authorized in the preceding paragraph, then Gas Company is directed to make distribution of the balance of the Contingency Fund in the manner described in Finding 17, above. Prior to making such distribution, Gas Company shall file the report and supporting calculations referred to in Finding 17. The Commission shall approve, disapprove, or modify Gas Company's proposed distributions to its respective customers prior to the making thereof.

D. Copies of this Final Order shall be mailed to Gas Company of New Mexico, Intervenors and their attorneys.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 22nd day of June, 1976.

[SEAL]

NEW MEXICO PUBLIC SERVICE COMMISSION

/s/ Richard P. Montoya
RICHARD P. MONTOYA
Chairman

/s/ Gary Blakeley
GARY BLAKELEY
Commissioner

Supreme Court, U.S.
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No. 87-962

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHERN UNION COMPANY,
Petitioner,

v.

CONSOLIDATED OIL & GAS, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New Mexico

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REPLY OF PETITIONER SOUTHERN UNION COMPANY

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REPLY OF PETITIONER SOUTHERN UNION COMPANY

INTRODUCTION

Southern Union's Petition for Certiorari emphasizes the inherent conflict between Consolidated's duties as a federally regulated natural gas seller and its claim under a state tort theory that it was reasonably ignorant of the regulatory status of four of its natural gas sales contracts. Petition at 18-20. In attempting to refute what it terms the "federal duties" argument, Consolidated's Brief in Opposition ("Oppos.") has introduced new factual arguments. Southern Union's "superior" knowledge of the destination of the gas is said to eliminate Consolidated's duty under federal law to know and conform to the federal price ceilings that govern its ju-

risdictional sales. Oppos. at 18-20. That superior knowledge arises from Southern Union's alleged "power" to switch Consolidated's gas, after purchase, between two parellel pipelines, one destined solely for intrastate commerce and a second jurisdictionally interstate line.[1] Southern Union's Reply is directed solely to the new factual arguments and their penumbra.

The switching argument is a jurisdictional and factual red herring. It is at odds with the reality of the undeniable dedication of Consolidated's gas to interstate commerce and with Supreme Court precedent. Nor can producers' responsibilities under federal law be found to turn upon inherently subjective determinations of who knew the most about regulated gas sales. The proper test should be an objective determination of what a producer is charged with knowing under the law. To permit a natural gas producer's responsibilities under federal law to turn upon a "superior knowledge" test—with the burden of knowledge resting on interstate purchasers—would improperly shift responsibility for regulated producers' conformance to federal law. Such a rule conflicts with the established scheme of federal natural gas price regulation which places the burden of compliance directly on sellers.

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[1] It is necessary here to distinguish between Southern Union and its then affiliate, Southern Union Gathering Company. Petition, n.1 at ii. The intrastate line was operated by Southern Union Company. The "interstate" line was operated by Southern Union Gathering Company. The four disputed contracts were between Consolidated and Gathering Company. No gas from the four disputed contracts ever flowed in Southern Union's intrastate pipeline as opposed to Southern Union Gathering Company's pipeline. During the first years of those contracts (1958 to 1970), Gathering owned and operated only one line; gas flowing through that line was sold in part to El Paso Natural Gas, an interstate pipeline company, and in part to a New Mexico distribution company, but federal jurisdiction was established over the entire gas stream due to the commingling of the gas flows. *See* 5 *infra*.

1. *Consolidated's Line Switching Theory Is Not Consistent With the Indisputable Dedication of the Gas to Interstate Commerce and Contrary to Federal Law Governing Dedication and Abandonment.*

Consolidated's argument that it could reasonably believe that its gas never flowed through Gathering's jurisdictional line rests upon a finding of the trial court that Southern Union had the "unilateral power" to determine whether the gas would be shipped in interstate commerce and a related argument that Consolidated did not know where or whether it had been so shipped. Oppos. at 18-19. Although the trial court made the cited finding, that factual finding is at odds with the legal conclusion later reached by the New Mexico Supreme Court that the gas from the disputed contracts was dedicated to interstate commerce. Oppos. at 6. That conclusion was inescapable given the finding of the FERC, upheld on review by the U.S. Court of Appeals, that Consolidated's disputed gas was dedicated and subject to federal jurisdiction. *Southern Union Gathering Co.*, 28 FERC ¶ 61,225 (1984), *aff'd*, 30 FERC ¶ 61,350 (1985), *aff'd sub nom. Consolidated Oil & Gas, Inc.* v. *FERC*, 806 F.2d 275 (D.C. Cir. 1986).

The New Mexico trial court finding—upon which the Brief in Opposition heavily relies—cannot be reconciled with the concept of dedication for if the disputed gas were ever so dedicated, it could not leave interstate commerce without prior federal approval, even if the underlying sales contract had expired.[2] The ironclad grip of

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[2] In specific terms, because Consolidated's gas flowed in Gathering Company's pipeline, the commingling doctrine established in *California* v. *Lo-Vaca Gathering Co.*, 379 U.S. 366 (1965) ("*Lo-Vaca*") resulted in the dedication of the gas that had flowed to interstate commerce, from which it could not be removed, at least through 1978, without prior abandonment authority from the FERC. *California* v. *Southland Royalty Co.*, 436 U.S. 519, 525-27 (1978).

federal jurisdiction upon dedicated gas led to sharply different interstate and intrastate gas markets, and ultimately to the merging of the markets for price regulation in the Natural Gas Policy Act of 1978. *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board*, 474 U.S. 409 (1986). If the gas from the disputed contract was dedicated to interstate commerce, as it undeniably was, when did the *unilateral* power to switch between the two pipelines come into play? It could not exist after dedication consistent with federal law. If Southern Union theoretically had such a choice *before* dedication occurred, that power ceased once dedication had occurred which was years before the settlement was negotiated.

Second, as a matter of paramount federal law, Southern Union's alleged unilateral ability to "switch" gas between its intrastate lines and Gathering's jurisdictionally interstate line could not exist. No reading of *Lo-Vaca* and companion dedication and abandonment precedent suggests that gas could be switched in and out of interstate commerce at the sole discretion of a purchaser subject to federal certificate jurisdiction. Federal control over dedication and abandonment means exactly the opposite. Once committed and dedicated to interstate commerce, gas continued in interstate jurisdiction unless authority to abandon was granted, contract provisions notwithstanding. *California* v. *Southland Royalty Co.*, 436 U.S. at 526. The precedent of this court thus flatly contradicts the trial court's notion of an "on again/off again" dedication to interstate commerce.[3]

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[3] These same legal principles determined the outcome of Consolidated's claim at FERC and the D.C. Circuit that the geographic destination of its gas could determine its federal jurisdictional status. See discussion at p. 5 *infra*.

2. *The New Mexico Court's "Superior Knowledge" Test Conflicts With and Undermines Enforcement of the Federal Scheme of Gas Price Regulation.*

Consolidated argues that no provision of federal law requires gas producers to do anything more than ask those to whom they make gas sales about the "resale destination" of those sales. Oppos. at 19. On this basis, it contends that Consolidated met its obligations under federal law by making that inquiry of Southern Union.[4]

Natural Gas Act price regulation can arise either from the existence of sales for resale in interstate commerce, or from the commingling of gas involved in such sales with gas destined solely for "intrastate" consumption. Lo-Vaca, 379 U.S. at 369. The New Mexico Court, Appendices to Petition for Writ (App.) at 8a-9a, the FERC, App. at 16a-41a, and the D.C. Circuit, *Consolidated Oil & Gas, Inc.* v. *FERC*, 806 F.2d at 279, all agree that Consolidated's gas sales to Gathering became subject to federal regulation because gas in Gathering's line was so commingled. To continue to argue that destination is relevant when jurisdictional commingling is indisputable is to seek to pretend, contrary to fact, that commingling is not the basis of FERC jurisdiction here. Thus, to argue, as Consolidated does, that its inquiries into the geographic destination of the gas were relevant to the legal issues is to attempt to rewrite the jurisdictional map that this Court established more than thirty years ago.[5]

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[4] As a factual matter, the record reveals that Consolidated was told before entering into the settlement that gas from the disputed contracts had flowed in a commingled stream and hence in interstate commerce. Defendant's Exhibit (D.E.) 37A, in *Consolidated Oil & Gas, Inc.* v. *Southern Union Co.*, S.F. 79-2161(c).

[5] The United States Court of Appeals tellingly found:

> Consolidated never did deny that its gas had been commingled and some of it sold interstate, as Gathering Company asserts. Consolidated instead argued to the FERC that the sale of the gas in question was not jurisdictional, and now claims that this

Consolidated's contention that "no provision of federal law" applies here is also wrong as a matter of statutory construction. Oppos. at 19. The statutory scheme of price regulation places substantial and specific responsibilities on regulated producers. An underlying prerequisite to performance of those obligations is a duty to know the regulatory status of gas sales. Otherwise, compliance with the statute would be impossible and its purposes could not be effectuated. *See NAACP* v. *Civiletti*, 609 F.2d 514, 516-17 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) (statutory requirements may be inferred by necessary implication from the statutory context); 2A Sutherland Statutory Construction § 55.03 (4th ed. 1984).

Under the NGA, "[a]ll rates and charges made, demanded, or received" were subject to Commission review and approval or modification. 15 U.S.C. § 717c (1982). Under implementing regulations in effect since *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), Consolidated was required to file with the Commission all relevant documents evidencing its interstate sales transactions and the rates charged for such sales. *See* 18 C.F.R. §§ 154.91-154.92 (1987).

There is no dispute that Consolidated conformed to these regulations with respect to its sales to Gathering up to and following the settlement. Prior to 1972, as required, Consolidated filed its contracts and rate schedules for sales to Gathering with the Commission. D.E. 3, 6, 12, and 16. When the Commission increased the ceiling rates for interstate sales, Consolidated asked Gathering to cooperate in its applications to the Commission for its contractually based right to maximum federal

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argument constituted a denial of Gathering Company's factual assertions about commingling and interstate sale. Consolidated's points regarding the jurisdictional status *vel non* of the sales in question, however, were and are legal ones, not factual ones.

Id. at 279-80 (footnote omitted).

price for those sales. D.E. 17A and 20. After 1972, Consolidated filed applications for small producer blanket certificates with the Commission in which it represented that it made interstate sales of over 5 million MCF and that among those interstate sales were its previously certificated sales to Gathering. D.E. 18.

Enacted in 1978, the NGPA did not relieve Consolidated of its statutory responsibilities. In fact, it specifically places on producers the onus of knowing and conforming to federal law governing interstate sales. Under Section 504 of the Act, it is unlawful for any person "to *sell* natural gas at a *first sale price* in excess of any applicable maximum lawful price under this chapter." 15 U.S.C. § 3314(a)(1) (1982) (emphasis added). The Act provides for civil and criminal penalties for "knowing" violation of its provisions and defines "knowing" as "actual knowledge" or "the constructive knowledge deemed to be possessed by a reasonable individual who acts under similar circumstances." 15 U.S.C. § 3314(b)(6)(B) and (c)(5) (1982).

These NGPA penalty provisions make explicit what is implicit in the NGA—that a determination of what a regulated seller knows is not an inquiry into the seller's state of mind, but rather an objective inquiry into the "constructive" knowledge possessed by a reasonable seller acting under similar circumstances. The relevant "circumstances" must be those consistent with effectuation of the statutory purposes. Thus, under the statute, the relevant inquiry here is whether a reasonable producer acting under similar circumstances, *i.e.*, after fifteen years of representations to the Commission that specific gas sales are federally regulated, would "know" that the sales are federally regulated.

The New Mexico Supreme Court focused instead on Southern Union's alleged superior knowledge of the jurisdictional status of Consolidated's sales resulting from its relative size and sophistication and imposed a "fiduciary

obligation" on Southern Union with respect to its interstate transactions with Consolidated. App. at 11a. In so doing, the New Mexico Court failed to recognize the inherent conflict between what Consolidated had to know as a producer subject to federal price regulation and its claim of inferior knowledge. The missing inquiry was whether Consolidated's purported reliance on a single mistaken representation was reasonable in light of its statutory and regulatory obligations and its representations in filings with the Commission.

3. *This Court May Wish to Hold the Petition Until Appeal of the FERC Order on Which Consolidated Relies Is Complete.*

Apart from the "line switching" argument, Consolidated relies extensively on a FERC Order issued after the New Mexico Supreme Court's final decision to support its Opposition. *See* Oppos. at 9-12 and 15-20. This substantial reliance on an Order which is not before this Court represents an implicit acknowledgment that the legal analysis underlying the New Mexico Court's decision is indefensible.

Apart from the legal errors in the New Mexico decision, this Court should grant the Petition because of the significance of the preemption issues raised in this case —issues which are raised frequently in the context of current litigation between producers and interstate purchasers.[6] Alternatively, in light of Consolidated's reli-

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[6] There are presently close to two hundred lawsuits by interstate pipeline purchasers and producers in varying stages of litigation. *Natural Gas Contracts*, Federal Programs Advisory Service, Section 12, pp. 1-17 (November 1987). In a number of cases, courts have been directly confronted with questions of whether state court damage awards exceed NGPA ceiling prices. *See, e.g., Universal Resources Corp.* v. *Panhandle Eastern Pipe Line Corp.*, 813 F.2d 77, 80 (5th Cir. 1987); *Resources Investment Corp.* v. *Enron Corp.*, 669 F. Supp. 1038, 1041 (D. Colo. 1987); *Gulf Oil Corp.* v. *Tenneco, Inc.*, 608 F. Supp. 1493, 1497 (D. La. 1985).

ance on the FERC Order, it might also be appropriate for the Court to reserve its decision on this Petition until after the Court of Appeals for the D.C. Circuit has reviewed the FERC Order. If, as is likely, one of the parties petitions for review of the D.C. Circuit's decision, this Court would then have an opportunity to review the case in its entirety.[7]

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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[7] A decision to await the outcome of the D.C. Circuit's review would not prejudice Consolidated in any way. Southern Union has posted a bond for the full amount of the judgment below and interest continues to accrue, so Consolidated would suffer no injury. A briefing schedule has been established by the D.C. Circuit and oral argument is scheduled for May 31, 1988; the court should render its decision within a reasonable period thereafter, at which time this Court could evaluate more thoroughly the need to review the preemption issues raised by both of these proceedings.